Supreme Court, U. S.
FILED
DEC 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-858

PUBLIC BROADCASTING SERVICE, *Petitioner*

v.

NETWORK PROJECT, *et al.*, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:

NORMAN M. SINEL
ERIC H. SMITH
PUBLIC BROADCASTING SERVICE
475 L'Enfant Plaza West, S.W.
Washington, D.C. 20024

HARRY M. PLOTKIN
THEODORE D. FRANK
CYNTHIA L. HATHAWAY
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

December, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Public Broadcasting Service (PBS) requests that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A) is reported at 561 F.2d 963 (D.C. Cir. 1977). This decision reversed the judgment of the United States District Court for the District of Columbia. (Appendix

B). The District Court opinion is reported at 398 F. Supp. 1332 (D.D.C. 1975).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit (Appendix C) was entered on July 22, 1977. No petition for rehearing was filed. An extension of time to and including December 15, 1977, within which to petition for certiorari was granted on October 13, 1977. (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

In its decision, the Court of Appeals held that the District Court erred in not exercising pendent jurisdiction over Respondents' First Amendment claims even though both the District Court and the Court of Appeals held, on the basis of a Motion to Dismiss and before discovery was undertaken or trial commenced, that the statutory claim on which the Court's jurisdiction was predicated must be dismissed for want of a private right of action. The questions presented are:

1. Whether a District Court is authorized or required to exercise jurisdiction over pendent federal claims when the claim conferring jurisdiction on the Court is dismissed before discovery has taken place or trial begun on the grounds that no private right of action exists under the statute on which the claim rested?

2. Whether the Court of Appeals erred in holding that the District Court abused its discretion, as a matter of law, in dismissing the Respondents' pendent claims even though both the District Court and the Court of Appeals held that the claim over which the District Court had jurisdiction was dismissed at the threshold for want of a right of action?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved in this case are set forth in Appendix E. These provisions are 28 U.S.C. § 1331(a) (1970), *as amended by* Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721; 28 U.S.C. § 1337 (1970); 28 U.S.C. § 1361 (1970); the First and Fifth Amendments to the United States Constitution; and the Public Broadcasting Act of 1967, 47 U.S.C. §§ 396 *et seq.* (1970 & Supp. V 1975).

STATEMENT OF THE CASE

On May 31, 1973, Respondents—plaintiffs below—filed the complaint which forms the basis of this proceeding. Respondents are (1) two organizations (the Network Project and the American Civil Liberties Union) whose members are claimed to be viewers of public television, three individuals who are members of the Network Project and claim to be viewers of public television, and eight individuals who claim to be viewers of and financial contributors to public television (collectively referred to as the "viewer-plaintiffs"), and (2) three individuals who claim to have written, directed, or produced public television programs ("producer-plaintiffs"). Named as defendants, in addition to Petitioner PBS, are the Corporation for Public Broadcasting (CPB), Dr. Clay T. Whitehead, former Director of the Office of Telecommunications

Policy,[1] and Patrick J. Buchanan, former Special Assistant to the President.[2]

CPB is incorporated as a nonprofit corporation under the laws of the District of Columbia pursuant to the Public Broadcasting Act of 1967. It is governed by a Board of fifteen Directors appointed by the President, by and with the advice and consent of the Senate. *See* 47 U.S.C. §§ 396(b), (c)(1) (1970) (App. E. at 48a).[3] Under the terms of the Public Broadcasting Act, CPB is a nonprofit, nongovernmental organization which is to provide leadership and direction to the public broadcasting system and insulate the system from external pressures arising from its funding. *Id.* §§ 396(a), (b), (g) (App. E at 47a, 48a, 51a). CPB provides funds for the production of programs as well as for the distribution of those programs to stations which desire to broadcast them, and otherwise aids, encourages, and facilitates the growth and development of a public television system attuned to and serving the needs of the public both in particular localities and throughout the United States. *Id.* §§ 396(a)(4), (g)(1), (g)(2) (App. E at 47a, 51a, 52a). Under the Act, CPB is required to carry out these functions in a manner designed to insure the maximum independence and autonomy of the local stations. *Id.* §§ 396(g)(1)(D). (App. E at 52a).

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[1] The Office of Telecommunications Policy is an Office of the Executive Office of the President and was established by Exec. Order No. 11,556, 3 C.F.R. 956 (comp. 1966-70), *reprinted in* 47 U.S.C. § 305, at 11,666 (1970). Dr. Whitehead was sued in his individual and official capacities.

[2] Mr. Buchanan was sued in his individual and official capacities.

[3] Throughout this Petition the Appendices will be cited as (App. —— at ——).

PBS is a private nonprofit membership corporation whose members consist of virtually all the licensees of the noncommercial educational or public television stations located throughout the United States and its territories. PBS distributes national public television programs to all public television stations and provides its member-stations with other programs and program-related services.

The Complaint sets forth a total of nine claims. The first three allege that CPB and PBS, as agent for CPB, control the programming distributed to and broadcast by public television stations. The seventh and eighth claims allege that CPB and PBS allowed Defendants Whitehead and Buchanan to influence their decisions respecting programs funded and distributed by them. As to each of these claims, viewer-plaintiffs seek a declaration that CPB and PBS violated the Public Broadcasting Act of 1967 and the First Amendment to the Constitution by denying them the right to receive information without interference from Defendants Whitehead or Buchanan or from other named members of the White House staff. They also seek an injunction against similar future activity and an order enjoining CPB and PBS from exercising any direction or control over programs funded or distributed by them.

The fourth claim for relief states that CPB and PBS refused to distribute programs written, directed, and produced by producer-plaintiffs.[4] Producer-plain-

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[4] Producer-plaintiffs alleged that CPB and PBS violated their rights by failing to distribute (1) a program, "The Politics and Humor of Woody Allen," and (2) a 12-minute segment of "The Great American Dream Machine" dealing with the FBI. These

tiffs claim that these actions violated the Public Broadcasting Act as well as the First and Fifth Amendments and seek compensatory damages for injury to their professional reputations, to their reputations for professional integrity, and to their work products.[5]

The complaint alleged that federal jurisdiction exists under three sections of the judicial code: 28 U.S.C. §§ 1331(a), 1337, and 1361 (1970) (App. E at 46a). PBS and CPB moved to dismiss the complaint on the grounds that the Court lacked subject matter jurisdiction over the complaint, the plaintiffs lacked standing, and the complaint failed to state a claim on which relief could be granted.[6]

On July 23, 1975, before discovery was begun,[7] the District Court granted the motions to dismiss. *Network Project* v. *Corporation for Public Broadcasting,* 398

programs were written, directed, and/or produced by the producer-plaintiffs.

[5] The remaining claims are not directed against PBS or CPB. Claims five and six aver that Defendants Whitehead and Buchanan influenced or sought to influence various aspects of public television operation. The ninth claim asserts that Irving Kristol, a former member of CPB's Board of Directors, was improperly participating in decisions of CPB. The ninth claim also asserts that the entire CPB Board of Directors must be restructured to reflect the diversity of backgrounds and occupations required by the Public Broadcasting Act. Plaintiffs abandoned the ninth claim in their appeal to the Court of Appeals.

[6] Defendants Whitehead and Buchanan also moved for dismissal or, in the alternative, summary judgment.

[7] Although Plaintiffs served discovery motions on CPB and PBS shortly after filing the Complaint, they did not oppose CPB's and PBS's Motion for Protective Orders pending District Court resolution of the Motion to Dismiss. No further efforts were undertaken to pursue discovery, even with respect to Defendents Whitehead and Buchanan's motion for summary judgment.

F.Supp. 1332 (D.D.C. 1975). The District Court held that under the Court of Appeals decision in *Holloway* v. *Bristol-Meyers Corp.,* 158 U.S. App. D.C. 207, 485 F.2d 986 (1973), and a series of decisions of this Court starting with *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974),[8] there was no private right of action under the Public Broadcasting Act of 1967. 398 F.Supp. at 1339, 1342 (App. B at 35a, 42a). In view of this holding, the District Court did not determine whether the Act was an "Act of Congress regulating commerce" within the meaning of 28 U.S.C. § 1337. 398 F.Supp. at 1340 (App. B at 37a). Moreover, the District Court concluded that, as a consequence of its holding, there was no pendent jurisdiction under 28 U.S.C. § 1337 over plaintiffs' pendent constitutional claims. 398 F. Supp. at 1340 n.9 (App. B at 37a). The District Court further held that plaintiffs had failed to establish that their claims involved an amount in controversy in excess of $10,000 as required under 28 U.S.C. § 1331(a), and thus dismissed their constitutional claims for want of jurisdiction. 398 F.Supp. at 1340, 1342 (App. B at 38a, 42a). The Court also held that producer-plaintiffs had failed to establish a basis for relief under the First and Fifth Amendments, and that 28 U.S.C. § 1361 would not support mandamus jurisdiction over PBS or CPB because neither were agencies of the United States. 398 F.Supp. at 1339, 1341 n.13 (App. B at 36a, 40a). The District Court did not reach the other issues.[9]

[8] The District Court also relied on *Cort* v. *Ash,* 422 U.S. 66 (1975), and *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412 (1975). *Network Project* v. *Corporation for Public Broadcasting,* 398 F.Supp. 1332, 1338 (D.D.C. 1975) (App. B at 33a).

[9] The District Court did not reach the questions of whether plain-

The Court of Appeals affirmed the District Court's disposition of the statutory claim.[10] The Court concluded, after reviewing the statutory scheme established by Congress in the Public Broadcasting Act, "that private rights of action are not part of the machinery devised by Congress for control of CPB's activities." *Network Project* v. *Corporation for Public Broadcasting,* 561 F.2d 963, 976 (D.C. Cir. 1977) (App. A at 24a). It thus held that a private right of action could not be inferred under the Act. *Id.* at 966, 976 (App. A at 3a, 24a). The Court, however, reversed the District Court's disposition of the First Amendment claims and held that

> [i]f the court derived power from [28 U.S.C. § 1337] to adjudicate [plaintiffs'] statutory contentions[,] . . . applicable legal principles required that it also hear [their] constitutional claims as an exercise of pendent jurisdiction.

Id. at 968-69 (App. A at 8a) (footnotes omitted).[11] The Court concluded that the District Court's failure

tiffs had standing, whether the alleged conduct of CPB and PBS involved "state action," or whether, assuming "state action," the complaint stated a cause of action under the First Amendment. 398 F.Supp. at 1342 (App. B at 41a). The claims against Defendants Whitehead and Buchanan were dismissed as moot. *Id.*

[10] On an issue not relevant here, the Court also upheld the District Court's dismissal of the claim against Dr. Whitehead as moot. *Network Project* v. *Corporation for Public Broadcasting,* 561 F.2d 963, 966-68 (D.C. Cir. 1977) (App. A at 3a-6a). Plaintiffs did not appeal the District Court's decision dismissing the suit against Mr. Buchanan. *Id.* at 966 & n.6 (App. A at 2a, 3a).

[11] The Court of Appeals held that Section 1337 jurisdiction was assertable because the Public Broadcasting Act was enacted as an amendment to the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1970), and that the latter was an "Act of Congress regulating commerce" within the meaning of Section 1337. 561 F.2d at 969 (App. A at 10a).

to hear those claims constituted an abuse of discretion.[12] Consequently, the Court of Appeals remanded the case to the District Court for consideration of the pendent claims.

REASONS FOR ISSUING THE WRIT

The issue presented to the Court in this Petition is whether district courts are to entertain federal claims beyond their jurisdiction when those claims are joined with claims within their jurisdiction even though the jurisdiction-conferring claim is disposed of on a motion to dismiss, before any discovery is undertaken, or trial commenced, and nothing remains of the case but the pendent federal claim. The Court of Appeals' holding that, as a matter of law, the District Court abused its discretion in failing to entertain a pendent federal claim under those circumstances presents an important question concerning the jurisdiction of federal courts which has never been, but should be, resolved by this Court.[13]

The Federal Jurisdiction Question Is Important

Federal courts are courts of limited jurisdiction and, in the absence of special circumstances not present here, may entertain claims only where specifically authorized by Congress. *See Aldinger* v. *Howard,* 427 U.S. 1, 17-18 (1976); *Victory Carriers, Inc.* v. *Law,* 404 U.S. 202, 212 (1971); *Snyder* v. *Harris,* 394 U.S.

[12] The Court of Appeals thus did not reach the question of whether the District Court had jurisdiction over those claims under 28 U.S.C. § 1331(a). 561 F.2d at 969 n.36 (App. A at 8a).

[13] *See Hagans* v. *Lavine,* 415 U.S. 528 (1974), and *Rosado* v. *Wyman,* 397 U.S. 397 (1970), discussed *infra. Compare Romero* v. *International Terminal Operating Co.,* 358 U.S. 354 (1959).

332, 339-40 (1969); *Healy* v. *Ratta,* 292 U.S. 263, 269-70 (1934). The doctrine of pendent jurisdiction is a narrow exception to that constitutional limitation. "Its justification lies in considerations of judicial economy, convenience and fairness to litigants . . . ." *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 726 (1966). None of those factors is present, however, when the claim upon which jurisdiction is predicated is dismissed at the threshold before there has been any meaningful investment of effort by either the parties or the court. Thus, where the pendent claim is grounded in state law, this Court has clearly held that

> if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Id. (footnote omitted).[14]

[14] This holding has been universally followed by the Courts of Appeals. *See Hodge* v. *Mountain States Telephone & Telegraph Co.*, 555 F.2d 254 (9th Cir. 1977) (no private rights of action existed under the Federal Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 2510 *et seq.* (1970) or under Section 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1970); the district court was instructed to dismiss the pendent state claims "for want of federal jurisdiction."); *Kurz* v. *Michigan,* 548 F.2d 172 (6th Cir. 1977) (the federal causes of action under the Civil Rights Act, 42 U.S.C. §§ 1983, 1985 (1970), were dismissed; the pendent state law claims being no longer pendent must be dismissed likewise); *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977) (no actionable federal claim was stated under the Federal Civil Rights Act, 42 U.S.C. § 1985(1) (1970), and no other basis for federal jurisdiction existed; the court ordered the district court to dismiss the entire complaint which had included pendent state claims); *Briscoe* v. *Bock,* 540 F.2d 392 (8th Cir. 1976) (no federal claims under the Civil Rights Act, 42 U.S.C. §§ 1983, 1985(3) (1970), were stated, and the court dismissed the entire complaint which included a pendent state claim; the court held: "[I]f the district court had no jurisdiction with respect to the federal claim asserted by plaintiff, it had no jurisdiction of the pendent [state] claim . . . ."). It obtains even though the District Court may elect to decide the pendent state claim if the federal claim involves a consitutional issue.

The Court of Appeals held that this rule should not apply in the instant case solely because the pendent claim was federal. 561 F.2d at 970 (App. A at 11a-12a). Noting that federal courts were uniquely capable of resolving constitutional questions, the Court of Appeals concluded that, under this Court's decision in *Hagans* v. *Lavine,* 415 U.S. 528 (1974), the Congressional determination, codified at 28 U.S.C. § 1331 (1970), that federal courts may only entertain federal claims where the amount in controversy exceeds $10,000 was not relevant in deciding whether to exercise pendent jurisdiction. 561 F.2d at 971 n.70 (App. A at 14a).[15] The Court of Appeals gave no consideration

[15] The Court of Appeals also seemed to rely on the recent amendment to Section 1331 allowing suits against the United States, its agents, officers and employees without regard to the amount in controversy to support its holding. 561 F.2d at 971 n.70 (App. A at 14a). The Court of Appeals found that that amendment reflected "a congressional view that federal claimants suing federal defendants should have access to federal courts regardless of the monetary value of their claims." *Id.* However, neither PBS nor CPB is an agent, officer, or employee of the United States. Moreover, by amending the statute to permit actions against one class of defendants, Congress clearly intended not to allow suits against another class—the defendants here. *See Securities Investor Protection Corp.* v. *Barbour, supra* at 420-21; *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers,* 414 U.S. 453, 458 (1974); *Goldman* v. *First Federal Savings & Loan Ass'n,* 518 F.2d 1247, 1250 n.6 (7th Cir. 1975); 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §§ 47.23-.25 (rev. 3d ed. 1973). That amendment alone should preclude the exercise of pendent jurisdiction in the instant case. *See Aldinger* v. *Howard,* 427 U.S. 1, 17 (1976) ("Parties . . . whom Congress *excluded* . . . can argue with a great deal of force that the scope of that 'civil action' over which the

to the fact that the plaintiffs' jurisdiction-conferring claim was dismissed at virtually the earliest possible moment and before the court or the parties had invested any substantial time or devoted significant resources to the prosecution of the case. The Court of Appeals simply stated:

> Since we perceive nothing out of the ordinary that would justify a refusal of pendent jurisdiction here, we hold that the District Court erred in dismissing [plaintiffs'] constitutional claims.

Id. at 971 (App. A at 14a) (footnote omitted). While the Court of Appeals disclaimed any intention to require federal district courts to exercise jurisdiction over pendent claims whenever they are federal, *id.*, the effect of its decision is to require just such a result.

That conclusion would appear at odds with the decision of this Court in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers, supra.* In that case, plaintiffs had challenged the National Railroad Passenger Corporation's termination of certain rail passenger service on the ground that the termination violated the Rail Passenger Service Act of 1970 (Amtrak Act), 45 U.S.C. § 501 *et seq.* (1970). Jurisdiction rested on 28 U.S.C. § 1337 (1970) and 45 U.S.C. § 547(a) (1970). The Court of Appeals had held that the district court has jurisdiction under Section 1337, that the plaintiffs had standing, and that a private right of action existed under the statute. This Court reversed, holding:

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district courts have been given statutory jurisdiction should not be so broadly read as to bring them *back* within that power merely because the facts also give rise to an ordinary civil action against them under state law.") (emphasis in the original).

> [T]he threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the . . . District Court had jurisdiction to entertain it.[16]

The Court went on to state: "Since we hold that no right of action exists, questions of standing and jurisdiction become immaterial." 414 U.S. at 465 n.13. That holding clearly indicates that the absence of a federal right of action is in the nature of a jurisdictional defect which would preclude the exercise of pendent jurisdiction.[17]

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[16] 414 U.S. at 456. *See also Allen* v. *State Board of Elections,* 393 U.S. 544, 554 (1969) ("if § 5 authorizes appellants to secure the relief sought, the district courts had jurisdiction [under 28 U.S.C. § 1343(4) (1970)] over these suits.").

[17] Where the asserted federal claim is insubstantial, the Courts of Appeals have agreed that pendent jurisdiction cannot be exercised. *See, e.g., Ohio Inns, Inc.* v. *Nye,* 542 F.2d 673 (6th Cir. 1976), *cert. denied,* 430 U.S. 946 (1977); *Delavigne* v. *Delavigne,* 530 F.2d 598 (4th Cir. 1976); *Nolan* v. *Meyer,* 520 F.2d 1276 (2d Cir.), *cert. denied,* 423 U.S. 1034 (1975); *Randall* v. *Goldmark,* 495 F.2d 356 (1st Cir.), *cert. denied,* 419 U.S. 879 (1974); *Rivera* v. *Chapel,* 493 F.2d 1302 (1st Cir. 1974); *Kavit* v. *A. L. Stamm & Co.,* 491 F.2d 1176 (2d Cir. 1974); *Warrington Sewer Co.* v. *Tracy,* 463 F.2d 771 (3d Cir. 1972); *Elberti* v. *Kunsman,* 376 F.2d 567 (3d Cir. 1967). *But see Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963); *Bell* v. *Hood,* 327 U.S. 678 (1946). In *Bell* v. *Hood* this Court held that the district court had jurisdiction over a claim under 28 U.S.C. § 1331 where "the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* at 685. The Court, however, did not reach the question of whether that bare bones jurisdictional predicate would be sufficient to support a pendent

Even without regard to whether the dismissal of plaintiffs' statutory claim for want of a right of action is a jurisdictional finding, the early dismissal of that jurisdictional-conferring claim must bar the District Court from entertaining the pendent claims. The considerations which justify the exercise of pendent jurisdiction simply no longer exist: there has been no meaningful investment of judicial time or effort and remitting the parties to the state courts imposes no greater hardship on them than a dismissal for failure to allege any basis for invoking federal jurisdiction.[18] There can be no earlier dismissal of a claim or less investment of time or effort.[19] To require, as the Court

claim, and indeed, on remand, the district court dismissed the pendent claim upon finding no right to damages under the Fourth Amendment. *Bell* v. *Hood*, 71 F.Supp. 813, 819-20 (S.D. Cal. 1947). The question was similarly reserved in *Wheeldin* v. *Wheeler*, *supra* at 652.

[18] *See Nolan* v. *Meyer*, *supra* at 1280 ("we would be inclined to hold that the retention of jurisdiction for trial of a pendent state law claim on the basis of a federal question claim already disposed of by a Rule 12(b)(6) motion, would be an abuse of discretion absent unusual circumstances, not present here, suggesting some prejudice arising from relegating the case for trial in the state court."); *IIT* v. *Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) ("Pendent jurisdiction can be relied upon only when there is a claim conferring federal jurisdiction that will survive a motion to dismiss.").

[19] The time spent resolving whether to dismiss a case has been a factor in deciding whether to exercise pendent jurisdiction in a given case. *See, e.g., Arizona* v. *Cook Paint & Varnish Co.*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); *Tully* v. *Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976); *CES Publishing Corp.* v. *St. Regis Publications, Inc.*, 531 F.2d 11 (2d Cir. 1975); *Kuhn* v. *National Ass'n of Letter Carriers*, 528 F.2d 767 (8th Cir. 1976); *Toensing* v. *Brown*, 528 F.2d 69 (9th Cir. 1975); *Nolan* v. *Meyer*, *supra*; *IIT* v. *Vencap, Ltd.*, *supra*; *Kavit* v. *A. L. Stamm & Co.*, *supra*; *Ruckle* v. *Roto American Corp.*, 339 F.2d 24 (2d Cir. 1964).

of Appeals did here, the exercise of federal jurisdiction in these circumstances seriously undermines the constitutional prescription that Congress is to define the jurisdiction of the federal courts.

The Pendent Jurisdiction Question Is Unresolved

While this Court has stated that different considerations obtain when a pendent claim rests on federal rather than state law,[20] it has never indicated that the federal nature of a pendent claim requires the district courts to exercise pendent jurisdiction or that the federal nature of the claim removes the considerations set forth in *Gibbs* from the decision to exercise pendent jurisdiction.[21]

[20] *See Hagans* v. *Lavine*, *supra* at 548; *Rosado* v. *Wyman*, *supra* at 404.

[21] *See, e.g., Aldinger* v. *Howard*, 427 U.S. 1 (1976) (there can be no pendent party jurisdiction in a case where the congressional grant of federal jurisdiction has been interpreted to exclude primary federal jurisdiction over the party); *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975) (the district court properly dismissed the entire complaint which included pendent state claims when it ruled plaintiffs' securities claims were not cognizable in federal court); *Shea* v. *Vialpando*, 416 U.S. 251 (1974) (the district court "properly" decided the pendent federal statutory claim first, thus disposing of the case without convening a three-judge panel to decide the constitutional claim); *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605 (1974) (district court judgment that no equal protection violation existed reinstated by Supreme Court; pendent state claims not raised in certiorari petition, in briefs, or at oral argument; in any event, resolution of pendent state claims would not resolve case; dissent would have ordered resolution of the pendent state claims to avoid the constitutional decision); *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (where the equal protection claim was not wholly insubstantial, the district court correctly exercised pendent jurisdiction over the pendent federal statutory claim to avoid a constitutional decision); *Moor* v. *County of Alameda*, 411 U.S. 693 (1973) (dis-

In *Rosado* v. *Wyman,* 397 U.S. 397 (1970), this Court held that a district court had pendent jurisdiction to consider a supremacy clause claim where the equal protection claim with which it was joined was dismissed after hearings and argument because it had become moot. That case involved a challenge to a New York State welfare statute which reduced Aid to Families with Dependent Children (AFDC) benefits to certain residents of the state. The statute was challenged on the grounds that it violated the equal protection clause and was inconsistent with the Social Security Amendments of 1967. Jurisdiction over the equal protection challenge rested on 28 U.S.C. § 1343,[21] and that claim required a three-judge court under 28 U.S.C. § 2281. After the three-judge court was convened and hearings and argument were held, the New York Legislature amended the challenged statute so as to render the equal protection claim moot. 397 U.S. at 400, 403. Accordingly, the three-judge court was dissolved, but the single-judge district court proceeded to resolve the pendent supremacy clause claim. This Court held that jurisdiction existed in the district court to decide that

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trict court had discretion not to exercise pendent party jurisdiction); *Wyman* v. *Rothstein,* 398 U.S. 275 (1970) (district court opinion vacated with instructions to decide the pendent federal statutory claim first in order to avoid a constitutional decision); *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715 (1966) (where pendent state claim is appended to a federal claim and the federal claim is dismissed before trial, the pendent state claim should also be dismissed).

[22] Because the Court found pendent jurisdiction over the supremacy clause claim, it did not decide whether it had jurisdiction over that claim under 28 U.S.C. §§ 1331 or 1343(3). 397 U.S. at 405 n.7. *See also Hagans* v. *Lavine, supra* at 533 n.5, 536; *Edelman* v. *Jordan, supra* at 653 n.1.

pendent claim.[23] However, the Court also specifically noted that it was

> intimat[ing] no view as to whether the situation might have been different had the constitutional claim become moot before the District Court had invested substantial time in its resolution.

Id. at 404 n.4.

Similarly, *Hagans* v. *Lavine,* 415 U.S. 528 (1974), involved a case in which the jurisdiction-conferring claim was not dismissed at the threshold. That case involved an equal protection challenge to a state AFDC program and a pendent supremacy clause claim. The Court of Appeals had held the equal protection claim to be insubstantial and had dismissed the pendent supremacy clause claim for want of jurisdiction. This Court reversed, finding that the equal protection clause claim was sufficient to confer jurisdiction on the District Court and concluding that, where the "constitutional claim [is] sufficient to confer jurisdiction on the District Court to pass on the controversy[,]" the District Court could resolve the case on the basis of the pendent claim. *Id.* at 538. This was particularly true,

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[23] Four reasons were given for the Court's holding: First, the federal court's jurisdiction initially was properly invoked under 28 U.S.C. §§ 1343(3), (4). 397 U.S. at 403. Second, mootness is frequently a matter beyond the control of the parties. *Id.* at 404. Third, unlike the problem of an insubstantial federal claim, mootness is not always apparent at the outset of a case and often may not occur until after substantial federal judicial time and energy have been expended in resolving a properly cognizable federal claim. *Id.* Fourth, the "commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation" would not be served by requiring jurisdiction over the constitutional claims at all subsequent stages of the lawsuit. *Id.* at 405. Of those reasons, only the first applies here.

the Court held, where the resolution of the pendent claim would avoid a constitutional question and the necessity to convene a three-judge court. *Id.* at 543-44. In view of that resolution of the case, the Court did not consider whether the District Court should have reached the pendent supremacy clause claim had the constitutional claim been dismissed at the threshold.[24] Indeed, this Court's decision rested in large part on the well-established doctrine that federal courts should avoid, when possible, unnecessary resolution of consti-

[24] While at first blush *Romero* v. *International Terminal Operating Co., supra,* would appear to involve this question, in fact, the district court there had jurisdiction over both the dominant and "pendent" claims, and the question was whether both claims could be resolved in one proceeding. In that case, the plaintiff brought suit for damages under the Jones Act, 46 U.S.C. § 688, and under the general maritime law of the United States for unseaworthiness of the ship, maintenance and cure, and negligence. The district court had jurisdiction under 28 U.S.C. § 1331 over the Jones Act claim and Section 1332 jurisdiction with respect to the maritime claims against some of the defendants. This Court held, that Section 1331, as distinguished from Section 1333, did not give the district court jurisdiction over the general maritime claim. However, it also held that "in the very limited circumstances" of the case, the district court could exercise "pendent" jurisdiction over the maritime claims under Section 1331. The Court went on to hold that the Jones Act claim did not state a cause of action. As distinguished from this case, the district court in *Romero* possessed jurisdiction over the pendent claim, and the only question was whether it could entertain that claim only in the context of its admiralty jurisdiction or whether it could also hear the claim sitting as a "court of law" under Section 1331. *See* Kurland, *The Romero Case and Some Problems of Federal Jurisdiction,* 73 HARV. L. REV. 817, 833-50 (1960). The case is thus inapposite. Indeed, rather than exercising jurisdiction in the face of a Congressional determination that federal district courts should not entertain claims over which the Court exercised "pendent" jurisdiction, there was a congressional determination that federal courts, sitting as courts of admiralty, should resolve those claims.

tutional issues. *Id.* at 543. *See Siler* v. *Louisville & Nashville Railroad Co.,* 213 U.S. 175 (1909).

In this case, there are no such compelling policy considerations supporting the exercise of pendent jurisdiction.[25] State courts are fully competent to resolve questions of federal law. As this Court noted recently in *Palmore* v. *United States,* 411 U.S. 389, 401, 407 (1973):

> [U]ntil 1875 Congress refrained from providing the lower federal courts with general federal-question jurisdiction. . . . [W]ith exceptions, the state courts remained the sole forum for the trial of federal cases not involving the required jurisdictional amount . . . .
>
> [B]oth Congress and this Court have recognized that state courts are appropriate forums in which federal questions and federal crimes may at times be tried . . . .

Similarly, in *Stone* v. *Powell,* 428 U.S. 465, 493 n.35 (1976), this Court held:

> Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.[26]

[25] Indeed, the Court of Appeals decision produces the anomolous result of allowing the first party alleging the meritless jurisdiction-conferring claim to gain access to the federal courts for resolution of the more viable pendent claim while making access for others turn on whether they can persuade the court in whose jurisdiction they file their complaint that the earlier resolution of the jurisdiction-conferring claim was not manifestly correct. Access to federal district courts cannot turn on such fortuity.

[26] *Accord, Huffman* v. *Pursue, Ltd.,* 420 U.S. 592, 611 (1975).

Further, remitting plaintiffs to the state courts is particularly appropriate here where there is no hostility between state and federal policies. As distinguished from supremacy clause claims [27] where the essence of the federal cause of action is an alleged failure of the state to abide by federal policy, here there is a congruity of interests between state and federal governmental policies. Virtually all, if not all, of the states have constitutional provisions basically similar to the First Amendment. And, in this case there is a particular confluence of interests since most of the states provide financial assistance to public broadcasting.[28] In these circumstances, deference must be paid to Congress's determination that federal district courts should not be burdened by claims—even constitutional claims—where the amount in controversy does not exceed

[27] Virtually all of the decisions finding jurisdiction over pendent federal claims have involved supremacy clause challenges to state statutes. There are persuasive reasons supporting the exercise of pendent jurisdiction in those cases for the question presented is one involving a conflict between federal and state policies. In those circumstances, federal adjudication of the supremacy clause claim will avoid the bias which state courts may have and will insure a more uniform development of federal policy. *Cf. Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). As Justice Holmes noted:

> I do not think that the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several States.

Holmes, O. W., *Collected Legal Papers* 295-96 (1920).

[28] Forty-two states operate public broadcast stations either through state public broadcasting agencies, through state school boards, or state institutions of higher education. Several states provide financial assistance to public broadcasting along lines similar to that provided by the federal government. Thirteen states have public broadcast stations licensed to local school boards.

$10,000.[29] The already overburdened federal courts should not be required to add to their burden by entertaining pendent federal claims where the jurisdiction-granting claim is dismissed at the threshold and nothing remains of the controversy but the claim over which the Court otherwise would not have jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Of Counsel:

NORMAN M. SINEL
ERIC H. SMITH
PUBLIC BROADCASTING SERVICE
475 L'Enfant Plaza West, S.W.
Washington, D.C. 20024

HARRY M. PLOTKIN
THEODORE D. FRANK
CYNTHIA L. HATHAWAY
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner Public Broadcasting Service

December, 1977

[29] This is especially true here in view of the recent amendment to 28 U.S.C. § 1331 to allow suits against the United States, its agents, officers and employees, without regard to the amount in controversy. By that amendment, Congress clearly indicated its intention not to allow suits against another class—the defendents here. *See* note 15 *supra*.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT

No. 75-1963

The NETWORK PROJECT et al., Appellants,

v.

CORPORATION FOR PUBLIC BROADCASTING, a corporation, et al.

Appeal from the United States District Court for the District of Columbia. (Civil Acton No. 1059-73).

Argued June 8, 1976.

Decided July 22, 1977.

Before ROBINSON and WILKEY, Circuit Judges, and WILLIAM J. JAMESON,* United States Senior District Judge for the District of Montana.

Opinion for the Court filed by Circuit Judge ROBINSON.

Appellants are numerous viewers of public television (viewer-appellants) [1] and three individuals who have written, directed and produced public television programs (producer-appellants).[2] Appellees are the Corporation for Public Broadcasting (CPB), established pursuant to congressional authorization as a conduit of federal funds for public television, and the Public Broadcasting Service (PBS), created by CPB to distribute public television programs to

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] Viewer appellants are the Network Project and the American Civil Liberties Union, organizations whose memberships include viewers of public television, and 11 individuals who are viewers also.

[2] Producer appellants are Paul Jacobs, Saul Landau and John Kuney.

local stations, together with Clay T. Whitehead, who as a former presidential aide, was Director of the Office of Telecommunications Policy. The appeal emanates from a judgment of the District Court dismissing an action precipitated by activities allegedly violative of rights secured by statute and the Constitution.[3]

In their complaint, appellants charge that appellees have censored and controlled the content of public television in contravention of the First Amendment [4] and legislation known as the Public Broadcasting Act.[5] Specifically, the complaint avers that CPB and PBS have eliminated funding for most or all controversial programs, and now require detailed descriptions of program content as a condition of funding. The complaint further avers that CPB and PBS have prescreened and censored programs, have required program changes prior to distribution, and have issued warnings to local stations about programs considered by them to be controversial. Whitehead and Patrick J. Buchanan, another former presidential aide once a party,[6] are accused of attempts to cause CPB and PBS to remove all controversial programs from the air.

Viewer-appellants seek declaratory and injunctive relief prohibiting appellees from interfering with their asserted right to see uncensored public television programs. Producer-appellants demand damages for injury to their professional reputations and their ability to market their work

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[3] *Network Project* v. *Corporation for Pub. Broadcasting*, 398 F.Supp. 1332 (D.D.C. 1975).

[4] U.S.Const. amend. I.

[5] Act of Nov. 7, 1967, Pub.L.No. 90-129, tit. II, § 201, 81 Stat. 368, as amended, 47 U.S.C. §§ 396 *et seq.* (Supp. V 1975), hereinafter cited as codified.

[6] Buchanan was a special consultant to the President. Though a defendant in the District Court, he is not a party here. See text *infra* following note 10.

products allegedly resulting from censorship of programs written, directed or produced by them. The District Court first dismissed the suit against the individual defendants as moot.[7] The court then held that appellants had failed to state a claim under the Public Broadcasting Act upon which relief could be granted.[8] Lastly, it dismissed the First Amendment contentions of viewer-appellants for lack of jurisdiction [9] and those of producer-appellants for lack of substantive merit. [10] We reverse the disposition of the First Amendment claims as to both viewer- and producer-appellants. In all other respects, we affirm.

I

The District Court held that insofar as the action sought declaratory and injunctive relief from Whitehead and Buchanan, the presidential aides, it had become moot because of their resignations from office after commencement of suit.[11] Appellants pursue this appeal only against Whitehead, formerly the Director of the Office of Telecommunications Policy.[12] They argue that they should now be allowed to proceed against Whitehead's successor.

While Federal Civil Rule 25(d)(1) provides for automatic substitution of a successor,[13] and eliminates the re-

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[7] *Network Project* v. *Corporation for Pub. Broadcasting*, *supra* note 3, 398 F.Supp. at 1335-1337.

[8] *Id.* at 1337-1339.

[9] *Id.* at 1339-1342.

[10] *Id.* at 1341 n. 13.

[11] *Id.* at 1335.

[12] See Reorganization Plan No. 1 of 1970, 3 C.F.R. 1066 (1971).

[13] Fed.R.Civ.P. 25(d)(1) provides in relevant part that "[w]hen a public officer is a party to an action in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party."

quirement that the plaintiff demonstrate need for continuing the action upon substitution,[14] it will not keep alive an otherwise moot controversy. This principle was firmly established by the Supreme Court's decision in *Spomer* v. *Littleton*.[15] There, residents of Cairo, Illinois, filed suit against Peyton Berbling, State's Attorney for Alexander County, charging him with a variety of racially discriminatory law enforcement practices. After the Seventh Circuit announced its decision on appeal, Spomer was elected to succeed Berbling. Relying on Supreme Court Rule 48(3),[16] Spomer then petitioned for certiorari to challenge the Court of Appeal's approval of the possibility of injunctive relief against the State's Attorney. The plaintiffs did not oppose this substitution, and the Supreme Court granted the writ.

After plenary review, however, the Court found nothing in the record upon which to base a conclusion that a concrete controversy between the residents of Cairo and the State's Attorney still existed.[17] Of primary importance here, the Court emphasized that "[t]he wrongful conduct charged in the complaint is personal to Berbling, despite the fact that he was also sued in his then capacity as State's Attorney,"[18] and that "[n]o charge is made in the complaint that the policy of the office of State's Attorney is to follow the intentional practices alleged . . . ."[19] The Court

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[14] 3B J. Moore, Federal Practice ¶ 25.09[3] at 25-401 (2d ed. 1974).

[15] 414 U.S. 514, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974).

[16] That rule, which is virtually identical to Fed.R.Civ.P. 25(d)(1), provides that "[w]hen a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party."

[17] *Spomer v. Littleton, supra* note 15, 414 U.S. at 520-522, 94 S.Ct. at 688-690, 38 L.Ed.2d at 699-700.

[18] *Id.* at 521, 94 S.Ct. at 689, 38 L.Ed.2d at 700.

[19] *Id.*

further noted that the plaintiffs made no allegation that Spomer intended to continue the practices of which they complained.[20]

At oral argument, counsel for the State's Attorney had indicated that Spomer did not intend to deviate from the practices of his predecessor.[21] The Court, however, held that "to determine whether respondents have a live controversy, . . . we must look to the charges *they* press."[22] Having found that there was a strong possibility of mootness, the Court remanded the case for a determination as to whether it was moot and whether the plaintiffs desired, and should be permitted, to amend their complaint to include claims for relief against Spomer.[23]

The similarities between *Spomer* and the instant case are obvious and for appellants insurmountable. Here, as in *Spomer*, the wrongful conduct charged is personal to the named defendant, despite his having been sued in his official capacity.[24] Like the plaintiffs in *Spomer*, appellants

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[20] *Id.* at 521-522, 94 S.Ct. at 689, 38 L.Ed.2d at 699-700.

[21] *Id.* at 522 n. 10, 94 S.Ct. 689 n. 10, 38 L.Ed.2d at 700 n. 10.

[22] *Id.* (emphasis in original).

[23] *Id.* at 522, 94 S.Ct. at 689-690, 38 L.Ed.2d at 700-701. On remand, the plaintiffs informed the Court of Appeals that they did not intend to name Spomer as an additional defendant because they were unable to allege that he was continuing the discriminatory practices of his predecessor. Accordingly, the court dismissed the complaint against Berbling as moot. *Littleton* v. *Berbling*, No. 71-1395 (7th Cir. Jan. 29, 1975) (unreported).

[24] The complaint charged, *inter alia*, that Whitehead pressured CPB officers to discontinue various controversial programs and to reduce live news coverage. Joint Appendix (J.App.) 19. Appellants' argument that they did not explicitly characterize the conduct of which they complain as personal to Whitehead is beside the point. They did assert that Whitehead committed certain discrete illegal acts, and in the absence of any allegation that the acts were other than individual—*i. e.*, departmental policy—their complaint can be construed only as charging personal misconduct.

here have not averred that it is departmental policy to follow the practices charged. Moreover, appellants have rejected an opportunity to amend their complaint to add allegations that the asserted conduct has continued beyond Whitehead's departure.

On the basis of the complaint,[25] then, we are unable to say that a live controversy now subsists between appellants and the Director of the Office of Telecommunications. Accordingly, we affirm the District Court's dismissal of the suit in that regard.

II

Next to be considered is whether the District Court possessed jurisdiction of appellants' statutory and constitutional claims. Jurisdiction was invoked on three separate grounds, all of which were deemed unacceptable. The court declined to exercise federal-question jurisdiction under 28 U.S.C. § 1331,[26] holding that appellants had failed to estab-

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[25] Appellants suggest that an affidavit which Whitehead submitted to the District Court, J.App. 37-41, shows that the acts complained of represented departmental policy, and thus that a live controversy persists in the absence of a disclaimer by Whitehead's successor. This argument is misconceived. The affidavit does not concede that it was departmental policy to interfere with CPB programming decisions; it simply asserts that the Director of the Office of Telecommunications has statutory responsibilities in matters concerning public broadcasting. In any event, Whitehead's representations are irrelevant since mootness must be determined solely by reference to the allegations of the complaining party. *Spomer v. Littleton*, *supra* note 15, 414 U.S. at 522, n. 10, 94 S.Ct. at 689 n. 10, 38 L.Ed.2d at 700 n. 10, quoted in text *supra* at note 23.

[26] "The district courts shall have original jurisdiction in any civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or

lish that the requisite $10,000 was in controversy.[27] The court also held that jurisdiction could not be predicated upon 28 U.S.C. § 1361.[28] That provision, which imparts jurisdiction over suits "to compel . . . any agency . . . to perform a duty owed to the plaintiff,"[29] was held inapplicable on the ground that CPB is not an agency, and CPB's directors are not officers, within its contemplation.[30] Finally, without deciding whether it had jurisdiction under 28 U.S.C. § 1337,[31] the court held that no right of action could be implied from the Public Broadcasting Act of 1967 and dismissed appellants' statutory claims accordingly.[32] In a brief footnote, the court added that "[i]n that instance there is no pendent jurisdiction under § 1337,"[33] and thereby nipped in the bud appellants' undertaking to demonstrate a constitutional basis for relief.

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employee thereof in his official capacity," 28 U.S.C. § 1331(a) (1970), as amended by Act of Oct. 21, 1976, Pub.L.No. 94-574, § 2, 90 Stat. 2721.

[27] *Network Project v. Corporation for Pub. Broadcasting*, *supra* note 3, 398 F.Supp. at 1340-1342.

[28] *Id.* at 1339.

[29] "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1970).

[30] *Network Project v. Corporation for Pub. Broadcasting*, *supra* note 3, 398 F.Supp. at 1339.

[31] "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopoly." 28 U.S.C. § 1337 (1970).

[32] *Network Project v. Corporation for Pub. Broadcasting*, *supra* note 3, 398 F.Supp. at 1337-1339, 1342.

[33] *Id.* at 1340 n. 9.

We think that in reaching this last conclusion, the District Court misconceived the scope of pendent jurisdiction. If the court derived power from Section 1337 to adjudicate appellants' statutory contentions—a matter we find not subject to serious dispute [34]—applicable legal principles required that it also hear appellants' constitutional claims as an exercise of pendent jurisdiction.[35] We conclude that its failure to do so constituted an abuse of discretion.[36]

Section 1337 confers jurisdiction on district courts in suits "arising under any Act of Congress regulating commerce. . . ." [37] This grant has been broadly interpreted to reach any federal statute for which the Commerce Clause [38] furnishes a predicate.[39] In *National Broadcasting Co. v. United States*,[40] the Supreme Court upheld the licensing system established by Congress in the Communications Act of 1934 [41] as a proper exertion of its power over interstate commerce.[42] The Communications Act is now fully recog-

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[34] We discuss this *infra* text at notes 37-49.

[35] We discuss this *infra* text at notes 50-68.

[36] In light of this disposition, we need not address appellants' other jurisdictional arguments.

[37] See note 31 *supra*.

[38] U.S.Const. art. 1, § 8, cl. 3.

[39] *Cupo v. Community Nat'l Bank & Trust Co.*, 438 F.2d 108, 109-110 (2d Cir. 1971); *Murphy v. Colonial Fed. Savs. & Loan Ass'n*, 388 F.2d 609, 614-615 (2d Cir. 1967); *Imm v. Union R.R.*, 289 F.2d 858, 859-860 (3d Cir.), *cert. denied*, 368 U.S. 833, 82 S.Ct. 55, 7 L.Ed.2d 35 (1961); *Caulfield v. United States Dep't of Agriculture*, 293 F.2d 217, 222 n. 10 (5th Cir.), *cert. dismissed*, 369 U.S. 858, 82 S.Ct. 946, 8 L.Ed.2d 16 (1961).

[40] 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1934).

[41] Act of June 19, 1934, ch. 652, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151 *et seq.* (1970).

[42] *National Broadcasting Co. v. United States*, *supra* note 40, 319 U.S. at 227, 63 S.Ct. at 1014, 87 L.Ed. at 1368.

nized as an "[a]ct of Congress regulating commerce" within the meaning of Section 1337.[43]

The Public Broadcasting Act originated in the Interstate Commerce Committees of both Houses of Congress, and came into being as an amendment to the Communications Act of 1934.[44] It expressly promotes the establishment and develpment of non-commercial educational radio and television broadcasting throughout the Nation.[45] These factors alone bring appellants' statutory claims well within the ambit of Section 1337. Indeed, there is nothing on the face of the statute or discernible in its history to suggest that Congress did not continue reliance upon its commerce power—an obvious facet of legislative authority—in passing the Public Broadcasting Act. Nor can there be the slightest doubt that the commerce power provides Congress with ample authority to foster the development of non-commercial television.[46]

For purposes of Section 1337, it is irrelevant that the Public Broadcasting Act might also be upheld as a valid

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[43] *Massachusetts Universalist Convention v. Hildreth & Rogers, Co.*, 183 F.2d 497, 499 (1st Cir. 1950); *Pugach v. Dollinger*, 277 F.2d 739, 741 (2d Cir. 1960) *aff'd*, 365 U.S. 458, 81 S.Ct. 650, 5 L.Ed.2d 678 (1961); *Springfield Television, Inc. v. City of Springfield*, 428 F.2d 1375, 1378 (8th Cir. 1970); *Weiss v. Los Angeles Broadcasting Co.*, 163 F.2d 313, 314 (9th Cir.), *cert. denied*, 333 U.S. 876, 68 S.Ct. 895, 92 L.Ed. 1152 (1947).

[44] S.Rep.No. 222, 90th Cong., 1st Sess. 1 (1967); H.R.Rep.No. 572, 90th Cong., 1st Sess. 1 (1967), U.S.Code Cong. & Admin.News 1967, p. 1772.

[45] See 47 U.S.C. §§ 396(a), (g) (Supp. V 1975).

[46] That the Commerce Clause sustains federal legislation promoting the growth of interstate commerce has long since been settled. *E. g., Second Employer's Liability Cases (Mondou v. New York, N. H. & H. R.R.)*, 223 U.S. 1, 47, 32 S.Ct. 169, 173-174, 56 L.Ed. 327, 345 (1912); *County of Mobile v. Kimball*, 102 U.S. 691, 696-697, 26 L.Ed. 238, 239 (1881); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564, 19 L.Ed. 999, 1001 (1871).

exercise of congressional power to spend for the general welfare.[47] "[T]o found jurisdiction upon § 1337, it is not requisite that the commerce clause be the exclusive source of Federal power; it suffices that it be a significant one." [48] It can hardly be gainsaid that the Commerce Clause, a self-sufficient basis for the Act, is at the very least a significant source of legislative authority for its enactment. We hold that the District Court had jurisdiction to consider whether appellants derived a cause of action from the statute, and we later review the court's decision on that score.[49]

Beyond that, since appellants' constitutional and statutory claims "derive from a common nucleus of operative fact" [50] and are such that appellants "would ordinarily be expected to try them [both] in one judicial proceeding," [51] the District Court clearly had power to hear the constitutional aspects of their lawsuit as a matter of pendent jurisdiction.[52] While "pendent jurisdiction is a doctrine of dis-

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[47] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . . ." U.S.Const. art. I, § 8, cl. 1.

[48] *Murphy v. Colonial Fed. Savs. & Loan Ass'n*, *supra* note 39, 388 F.2d at 615. See also *Davis v. Romney*, 490 F.2d 1360, 1365 (2d Cir. 1974); *Esposito v. Shultz*, 366 F.Supp. 1059, 1061 (N.D.Cal. 1973).

[49] In Part III *infra*.

[50] *UMW v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed. 218, 228 (1966).

[51] *Id.*

[52] *Id.* See also *Apton v. Wilson*, 165 U.S.App.D.C. 22, 35, 506 F.2d 83, 96 (1974); *Knuth v. Erie-Crawford Dairy Coop. Ass'n*, 395 F.2d 420, 426-27, (3d Cir. 1968), *on remand*, 326 F.Supp. 48 (W.D.Pa. 1971), *aff'd in part and rev'd in part*, 463 F.2d 470 (3d Cir. 1972), *cert. denied*, 410 U.S. 913, 93 S.Ct. 966, 3 L.Ed.2d 278, *on remand*, 58 F.R.D. 646 (W.D.Pa.), *aff'd*, 487 F.2d 1394 (3d Cir. 1973); *Burton v. Waller*, 502 F.2d 1261, 1265 n. 1 (5th

cretion, not of plaintiff's right," [53] discretion is not left to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." [54] In particular, the exercise of discretion must be responsive to the considerations of judicial economy, convenience and fairness to litigants which underlie and justify the phenomena of pendent jurisdiction.[55]

The District Court appears to have rested its refusal to assume pendent jurisdiction on the misconception that pretrial dismissal of the statutory claims necessitated dismissal of the pendent claims as well.[56] It is true that when state and federal claims are joined and the federal claims are dismissed before trial, the state claims should ordinarily be dismissed as well.[57] The policies implicated when a pendent claim is one based on state law, however, are inapplicable

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Cir. 1974), *cert. denied*, 420 U.S. 964, 95 S.Ct. 1356, 43 L.Ed.2d 442 (1975); *Vanderboom v. Sexton*, 422 F.2d 1233, 1242 (8th Cir.), *cert. denied*, 400 U.S. 852, 91 S.Ct. 47, 27 L.Ed.2d 90 (1970).

Another requirement of pendent jurisdiction is substantiality of the primary claim. *UMW v. Gibbs*, *supra* note 50, 383 U.S. at 725, 86 S.Ct. at 1138, 16 L.Ed.2d at 228. There can be no question but that appellants' primary claim—that a statutory cause of action should be implied—is not wholly without merit, even though it does not prevail. See Part III *infra*.

[53] *UMW v. Gibbs*, *supra* note 50, 383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d at 228.

[54] *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280, 296 (1975), quoting *United States v. Burr*, 25 F.Cas., No. 14,692d, pp. 30, 35 (Cir. Ct. Va. 1807) (No. 14) (Marshall, C. J.).

[55] *UMW v. Gibbs*, *supra* note 50, 383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d at 228.

[56] *Network Project v. Corporation for Pub. Broadcasting*, *supra* note 3, 398 F.Supp. at 1340 & n.9.

[57] *UMW v. Gibbs*, *supra* note 50, 383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d at 228.

when, as here, the pendent claims are federal.[58] As the Supreme Court has declared,

> the rationale of [the rule governing pendent state-law claims] centers upon considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts having more familiarity with the controlling principles and the authority to render a final judgment. These considerations favoring state adjudication are wholly irrelevant when the pendent claim is federal but is itself beyond the jurisdiction of the District Court . . . .''[59]

Moreover, there is particularly good reason for retaining a pendent claim when it owes its existence to federal law.[60] Beginning with *UMW* v. *Gibbs,*[61] the Supreme Court has recognized the special competence of federal courts to adjudicate claims implicating federal policy as a strong basis for exercising pendent jurisdiction. There the doctrine of preemption limited the permissible scope of the state claim, and the Court noted that ''federal courts are particularly appropriate bodies for application of pre-emption principles.''[62]

Similarly, in *Rosado* v. *Wyman*[63] a Supremacy Clause[64] claim not otherwise within the court's jurisdiction was

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[58] *Hagans v. Lavine,* 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

[59] *Id.* at 548, 94 S.Ct. at 1385, 29 L.Ed.2d at 594 (footnote omitted).

[60] 13 C. Wright, A. Miller & E. Cooper, Federal Practice § 3567 at 454 (1975).

[61] *Supra* note 50.

[62] *UMW v. Gibbs, supra* note 50, 383 U.S. at 729, 86 S.Ct. at 1140, 16 L.Ed.2d at 230.

[63] 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970).

[64] U.S.Const. art. VI, cl. 2.

joined with a constitutional claim independently cognizable. In upholding a district court's exertion of pendent jurisdiction, even after the constitutional claim had been dismissed as moot, the Court observed that the statutory question was one of federal policy and the argument for the exercise of pendent jurisdiction as therefore particularly strong.[65]

Likewise, in *Hagans* v. *Lavine,*[66] the Court approved an assumption of pendent jurisdiction over a Supremacy Clause claim in a situation where the constitutional claim, though not insubstantial in a jurisdictional sense, was likely without merit. In so doing, the Court again relied in large measure on the special capability of federal courts to adjudicate federal claims.[67]

Our review of applicable Supreme Court precedents thus reveals that the District Court's decision was unresponsive to the considerations that govern the exercise of pendent jurisdiction when the pendent claim invokes federal law.

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[65] *Rosado v. Wyman, supra,* note 63, 397 U.S. at 404, 90 S.Ct. at 1214, 25 L.Ed.2d at 451. Rejecting the argument that loss of power over the primary claim because of mootness foreclosed consideration of the pendent claim, the Court also noted:

> We are not willing to defeat the common-sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.

Id. at 405, 90 S.Ct. at 1214, 25 L.Ed.2d at 451 (footnote omitted). This policy of avoiding piecemeal litigation is equally viable whether the jurisdiction-conferring claim is dismissed on grounds of mootness as in *Rosado* or for failure to state a claim as in the instant case. Like the mooting of a claim, a dismissal under Fed.R.Civ.P. 12(b)(6) might not occur ''until after substantial time and energy have been expended looking toward resolution of [the] dispute . . . .'' *Id.* at 404, 90 S.Ct. at 1214, 25 L.Ed.2d at 451.

[66] *Supra* note 58.

[67] *Hagans v. Lavine, supra* note 58, 415 U.S. at 548 & n. 14, 94 S.Ct. at 1385 & n. 14, 39 L.Ed.2d at 594-595 & n. 14.

In particular, the District Court should have determined whether, with the stautory claim no longer in the case, considerations of judicial economy, convenience and fairness to litigants called for remittal of the federal constitutional claims to the state courts. We do not suggest that a federal court must automatically or necessarily assume jurisdiction of every pendent federal claim. On the contrary, pendent jurisdiction remains "a doctrine of discretion, not of plaintiffs' rights."[68] We do say, however, that involvement of federal law in a pendent claim is a factor significantly affecting the proper exercise of that discretion. As Mr. Justice Douglas noted in *Rosado v. Wyman*, "[when] the claim involved . . . is one of federal law, the reasons for the exercise of pendent jurisdiction are especially weighty, and exceptional circumstances [are] required to prevent the exercise."[69] Since we perceive nothing out of the ordinary that would justify a refusal of pendent jurisdiction here, we hold that the District Court erred in dismissing appellants' con-

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[68] *UMW v. Gibbs, supra* note 50, 383 U.S. at 726, 86 S.Ct. at 1139, 16 L.Ed.2d at 228.

[69] 397 U.S. at 425, 90 S.Ct. at 1224, 25 L.Ed.2d at 463 (concurring opinion).

[70] Prior to *Hagans v. Lavine, supra* note 58, it might have been argued that pendent jurisdiction could properly be disclaimed in light of a legislative policy expressed in 28 U.S.C. § 1331(a) (1970) that some constitutional claims below a minimum dollar amount should be left to state courts. See *id.* 415 U.S. at 559, 94 S.Ct. at 1390, 39 L.Ed.2d at 600 (Rehnquist, J. dissenting). This policy, however, was implicitly rejected by the *Hagans* majority as a persuasive ground for declining jurisdiction. *Id.* at 548, 94 S.Ct. at 1385, 39 L.Ed.2d at 594. Moreover, Congress has recently revised § 1331(a) to eliminate the $10,000 amount in controversy requirement in civil actions brought "against the United States, any agency thereof, or any officer or employee thereof in his official capacity." See note 26 *supra*. Without deciding whether the revision applies to this case, we think it clearly reflects a congressional view that federal claimants suing federal defendants should have access to federal courts regardless of the monetary value of

stitutional claims.[70] Our judgment accordingly will provide for a remand of those claims for disposition on the merits.[71]

III

Viewer appellants maintain that they are entitled to injunctive relief against the CPB for violation of various provisions of the Public Broadcasting Act of 1967. Since the Act does not explicitly authorize suits to enforce its provisions, any cause of action that appellants may have must be implied. The District Court noted that the Act undoubtedly was intended to benefit viewers of public television.[72] Nonetheless, the court held that implication of a

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their claims. Thus, any colorable basis for leaving the instant constitutional claims to state courts is further undercut.

PBS suggests that since assumption of pendent jurisdiction will result in decision rather than avoidance of a constitutional question, pendent jurisdiction should be refused. Brief for Appellee PBS at 29 n. 20. While the policy of avoiding difficult constitutional questions is undoubtedly a strong one, *Hagans v. Lavine, supra* note 58, 415 U.S. at 546-547 & n. 12, 94 S.Ct. at 1383-1384 & n. 12, 39 L.Ed.2d at 593-594 & n. 12, declining jurisdiction here will not eliminate the necessity of a constitutional decision, but will simply leave its disposition to state courts. As we have shown, there is no policy favoring state court adjudication of federal claims.

[71] Whether a right of action is to be inferred from the Constitution is normally a question on the merits rather than one of jurisdiction. *Bell v. Hood*, 327 U.S. 678, 681-685, 66 S.Ct. 773, 775-777, 90 L.Ed. 939, 942-945 (1946); *Cardinale v. Washington Technical Inst.*, 163 U.S.App.D.C. 123, 127-128, 500 F.2d 791, 795-796 (1974). See also *Apton v. Wilson, supra* note 52, 165 U.S.App. D.C. at 35 & n. 16, 506 F.2d at 96 & n. 16. The District Court has not yet addressed appellants' constitutional claim on that basis, see *Network Project v. Corporation for Pub. Broadcasting, supra* note 3, 398 F.Supp. at 1340 & n. 9, 1342, hence the remand. Of course, we intimate no view as to how the question should be decided.

[72] *Network Project v. Corporation for Pub. Broadcasting, supra* note 3, 398 F.Supp. at 1338.

right of action would seriously impede attainment of the Act's purpose and would inevitably enmesh the courts in supervision of CPB's day-to-day operations.[73] We too conclude that a right of action should not be inferred, but for reasons different from those articulated by the District Court.

To begin with, "the inference of . . . a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."[74] Furthermore, judicial implication of rights of action should be approached with great care "lest a carefully erected legislative scheme—often the result of a delicate balance of Federal and state, public and private interests—be skewed by the courts, albeit inadvertently."[75] Thus, "[w]hen a court fairly perceives how the legislature accomplished a resolution of the balance of forces, including compromise and concession, the court must abide the result without using its own scales to weigh the strength of the component vectors."[76] With the concerns in mind, we turn to the Public Broadcasting Act to determine whether implication of a right of action is "consistent with the evident legislative intent."[77]

In 1952, the Federal Communications Commission (FCC) began to reserve channels for the exclusive use of educa-

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[73] *Id.* at 1338-1339.

[74] *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646, 651-652 (1974).

[75] *Holloway v. Bristol Meyers Corp.*, 158 U.S.App.D.C. 207, 210, 485 F.2d 986, 989 (1973).

[76] *Id.* at 223, 485 F.2d at 1002.

[77] See text *infra* at note 80.

tional television.[78] Because of the substantial installation costs, the number of noncommercial stations grew slowly.[79] In 1962, the Educational Television Facilities Act[80] responded to this problem by providing matching funds for the construction of noncommercial stations.[81] Despite rapid growth in the number of stations following its passage, however, shortage of funds and difficulty of exchanging programs among the stations forestalled elevation of the caliber of public telecasts.[82]

In 1966, the Carnegie Commission was organized to conduct a study.[83] The Commission concluded that federal financial assistance would be required to provide the resources necessary for development of superior programs.[84] Perceiving a danger in direct governmental involvement in public broadcasting, however, the Commission recommended that a private nonprofit corporation be created to disburse governmental funds.[85] The corporation envisioned by the Commission would support local stations, "yet [would] be restrained from control or the appearance of control over them."[86] And the corporation would not escape the scrutiny that properly follows the appropriation of federal money, but would be insulated from interference with

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[78] See *Sixth Report and Order on Television Allocation*, 41 F.C.C. 148 (1952).

[79] S.Rep.No. 67, 87th Cong., 1st Sess. 3 (1961).

[80] Act of May 1, 1962, Pub.L.No. 87-447, tit. III, 76 Stat. 65, as amended, 47 U.S.C. §§ 390 *et seq.* (1970 & Supp. V 1975), hereinafter cited as codified.

[81] 47 U.S.C. § 392 (1970).

[82] S.Rep.No. 222, 90th Cong., 1st Sess. 4 (1967).

[83] Carnegie Commission on Educational Television, Public Television: A Program for Action (1967).

[84] *Id.* at 68-79.

[85] *Id.* at 36-42.

[86] *Id.* at 37.

the day-to-day operation of the programming portions of its work.[87]

Congress incorporated many of the Carnegie Commission's suggestions into the Public Broadcasting Act of 1967. The Act authorized creation of the Corporation for Public Broadcasting, "a nonprofit corporation . . . which [would] not be an agency or establishment of the United States Government," [88] as a funding mechanism for virtually all activities comprising noncommercial broadcasting.[89] Consistently with the expectations of the Commission, Congress conceived CPB as a vehicle for infusing federal money into public broadcasting without the introduction of government direction or control.[90]

In determining whether private resort to the provisions of the Act harmonizes with congressional intent, we do not write on a clean slate. In *Accuracy in Media, Inc. v. FCC*,[91] we considered the contention that FCC had authority to enforce the Act's call on CPB to facilitate programming with "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature." [92] After reviewing the structure of the public broadcasting system, we were of the view that Section 398 of the Public Broadcasting Act expressly barred FCC jurisdiction over CPB.[93] That section specifies that nothing in the Educa-

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[87] *Id.*

[88] 47 U.S.C. § 396(b) (Supp. V 1975).

[89] *Id.* §§ 396(g)(1), (2) (Supp. V 1975).

[90] H.R.Rep.No. 572, 90th Cong., 1st Sess. 15 (1967); S.Rep.No. 222, 90th Cong., 1st Sess. 4 (1967).

[91] 172 U.S.App.D.C. 188, 521 F.2d 288 (1975).

[92] 47 U.S.C. § 396(g)(1)(A) (Supp. V 1975).

[93] *Accuracy in Media, Inc.* v. *FCC*, *supra* note 91, 172 U.S.App. D.C. at 192, 521 F.2d at 292.

tional Television Facilities Act [94] or the Public Broadcasting Act "shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the Corporation [for Public Broadcasting] or any of its grantees or contractors . . . ." [95] Since any enforcement of the statutory requirement would necessarily entail "supervision" of CPB, we held that the plain words of Section 398 precluded FCC from acting.[96]

PBS suggests that Section 398 also forecloses implication of a private right of action since entertainment of private suits would necessarily involve the courts in "supervision," and courts, no less than administrative bodies, are governmental "agencies." [97] We reject this sweeping interpretation of the statutory prohibition. The plain purpose of Section 398 is to prevent any governmental body from influencing CPB in a manner calculated to turn it into a governmental spokesman.[98] While Congress mani-

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[94] See text *supra* at notes 80-82.

[95] 47 U.S.C. § 398 (1970).

[96] *Accuracy in Media, Inc. v. FCC*, *supra* note 91, 172 U.S.App. D.C. at 192, 521 F.2d at 292.

[97] Brief for Appellee PBS at 24.

[98] *Accuracy in Media, Inc. v. FCC*, *supra* note 91, 172 U.S.App. D.C. at 193, n. 17, 521 F.2d at 293 n. 17. There we stated our understanding of § 398 as follows:

> Section 398, formerly § 397 was amended by the 1967 Act to include the Corporation and its activities. The original section was enacted as a provision of the Educational Television Facilities Act of 1962. The prohibition of federal interference was included then as a part of an understanding that "the FCC is not to exercise any control of funds under this program". S.Rep.No. 67, 87th Cong., 2d Sess., at 9 (1962), U.S. Code Cong. & Admin. News 1962, pp. 1614, 1620. The expan-

festly believed that FCC involvement in enforcing the Act's directives would create the very dangers that Section 398 sought to prevent,[99] it is unlikely that it made the same judgment with respect to courts occasionally summoned to resolve specific controversies arising under the Act. We would need more than PBS offers to persuade us that judicial enforcement of the Act's mandates would constitute "supervision" by a governmental "agency" within the meaning of Section 398. This is not to say that the section authorizes judicial action by negative implication, but only that is is neutral with respect to the question.

In *Accuracy in Media,* we did not rely solely on Section 398 for our holding that FCC was without power to monitor CPB's compliance with its statutory obligations. The structure of the Act and its history additionally persuaded us that FCC jurisdiction would be contrary to the "carefully balanced framework designed by Congress for the control of CPB activities."[100] We noted that Congress had erected numerous statutory safeguards against partisan abuses. For one conspicuous example, board membership is limited to no more than eight out of the authorized

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sion of the prohibition to apply to the Corporation and its activities is in keeping with the original fear that financial support by the Government could lead to control over speech.

[99] The Public Broadcasting Act leaves intact FCC regulatory authority over individual non-commercial licensees. *Accuracy in Media, Inc. v. FCC, supra* note 91, 172 U.S.App.D.C. at 196, 521 F.2d at 296. But FCC jurisdiction over CPB, we noted, could enlarge Government control over program content and thereby upset the balance struck in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) between the First Amendment rights of broadcast journalists and the interests of the viewing public. *Accuracy in Media, Inc. v. FCC, supra* note 91, 172 U.S.App.D.C. at 196-197, 521 F.2d at 296-297.

[100] *Id.* at 194, 521 F.2d at 294.

fifteen from the same political party.[101] As a further check, the Act insists that CPB's accounts be audited annually by an independent accountant,[102] and contemplates audits by the General Accounting Office,[103] Of major importance is Section 396(k), which assures that most of CPB's budget will be derived through the congressional appropriation process.[104] Section 396(i) complements these curbs with the requirement that CPB submit "a comprehensive and detailed report" on its operations and achievements to Congress annually.[105]

In consequence, we concluded that "[t]hrough these statutory requirements and control over the 'pursestrings,' *Congress reserved for itself the oversight responsibility for the Corporation.*"[106] By that statement we clearly implied that the statutory mandates are to be enforced exclusively by Congress. So, as later in our opinion we stated unequivocally, we viewed the provision advanced as the source of a private right of action "as a guide to Congressional oversight policy and as a set of goals to which the Directors of CPB should aspire,"[107] and "not [as] a substantive standard, legally enforcible by agency or courts."[108]

Appellants attempt to minimize the import of *Accuracy in Media* by branding its discussion of congressional over-

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[101] 47 U.S.C. § 396(e)(1) (Supp. V 1975).

[102] 47 U.S.C. § 396(*l*)(1)(A) (Supp. V 1975).

[103] 47 U.S.C. § 396(*l*)(2)(A) (Supp. V 1975).

[104] 47 U.S.C. § 396(k) (Supp. V 1975).

[105] 47 U.S.C. § 396(i) (Supp. V 1975).

[106] *Accuracy in Media, Inc. v. FCC, supra* note 91, 172 U.S.App. D.C. at 194, 521 F.2d at 294 (emphasis supplied) (footnote omitted).

[107] *Id.* at 197, 521 F.2d at 297.

[108] *Id.*

sight as dicta.[109] We think the discussion bore directly on our decision and thus has considerably more precedential value than appellants are willing to acknowledge. But even assuming that it is dicta, without *stare decisis* effect, appellants point to nothing that minimizes its persuasive force. Instead, they rely solely on a single passage from the House committee report on the Public Broadcasting Act as an indication that Congress counted on private litigation to insure CPB compliance with the statutory provisions at issue in this case.[110] That passage states:

> The educational stations must not be permitted to become vehicles for the promotion of one or another political cause, party, or candidate. It is assumed that the normal checks and balances within our political system will insure that this principle will be constantly safeguarded by interested citizens.[111]

We are wholly unconvinced that by this reference to the role of "interested citizens," Congress evinced an intent to authorize private rights of action. By our reading, it connotes merely that Congress anticipated that citizen participation through the political process would assist Congress in its oversight function. Even if the statement is deemed ambiguous, appellants' interpretation cannot withstand diametrically opposed expressions in the legislative history. Thus the passage of the committee report that directly follows the portion quoted reads:

> In the same manner that the bill strives to insulate the Corporation from governmental control, the bill provides *and the committee intends to see to it* that the local educational broadcasting stations conduct

[109] Brief for Appellants at 38.

[110] *Id.* at 28.

[111] H.R.Rep.No. 572, 90th Cong., 1st Sess. 19-20 (1967), U.S.Code Cong. & Admin. News 1967, p. 1810.

> their operations without Corporation interference or control.[112]

Other legislative antecedents of the Act confirm the view expressed in *Accuracy in Media* that Congress reserved for itself exclusive oversight responsibility. Senator Cotton explained:

> If this bill becomes law, . . . and if, as time goes on, we have occasion to feel that there is a slanting, a bias, or an injustice, we instantly and immediately can do something about it. First, we can make very uncomfortable, and give a very unhappy experience to, the directors of the corporation. Second, we can shut down some of their activities in the Appropriations Committee and in the appropriating process of Congress . . . . The Corporation is much more readily accessible . . . to the Congress, if it is desired to correct any injustice or bias which might appear.[113]

Senator Pastore makes this intent equally plain:

> [T]he *whole responsibility* here under this law is to the Congress of the United States . . . . We don't have to repeat the appropriation if we feel this is a failure. This is all subject to the scrutiny of the Congress of the United States.[114]

And, lest we forget, the very structure of the Act reinforces the thesis that Congress felt no need for judicial intervention to exact due regard for the Act.[115]

[112] *Id* at 20, U.S.Code Cong. & Admin. News 1967, p. 1810 (emphasis supplied).

[113] 113 Cong.Rec. 13003 (1967).

[114] *Hearings on S. 1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 123 (1967) (emphasis supplied).

[115] Text *supra* at notes 100-105.

We hold that private rights of action are not part of the machinery devised by Congress for control of CPB's activities. We accordingly affirm the District Court's rejection of appellants' statutory claims. For reasons articulated earlier, however, we think their constitutional claims were properly before the court.[116] To the extent necessary to enable their consideration on the merits, we reverse the judgment appealed from and remand the case for further proceedings consistent with this opinion.

So ordered.

[116] Text *supra* at notes 50-71.

APPENDIX B

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

NETWORK PROJECT et al., *Plaintiffs,*

v.

CORPORATION FOR PUBLIC BROADCASTING et al., *Defendants.*

Civ. A. No. 1059-73.

July 23, 1975.

Memorandum and Order

CORCORAN, District Judge.

In this action the plaintiffs seek declaratory and injunctive relief and damages for alleged violations of their rights under the Public Broadcasting Act of 1967 (the Act), *as amended,* 47 U.S.C. § 396 *et seq.* (1970), and under the First and Fifth Amendments to the Constitution. For reasons set out below, the Court concludes that the case against the individual defendants is moot; that the plaintiffs have no implied private right of action under the Public Broadcasting Act of 1967; and that the complaint is otherwise jurisdictionally defective.

I

The Parties

The plaintiffs are: (1) the Network Project, an unincorporated membership organization whose membership allegedly includes viewers of noncommercial educational television; (2) the American Civil Liberties Union (ACLU), many of whose members are alleged to be regular viewers

of noncommercial educational television; (3) 11 individuals who claim to be viewers of noncommercial educational television; and (4) three individuals, *viz.*, Paul Jacobs, Saul Landau and John Kuney, who claim to have written, producted or directed programs for noncommercial educational television.

The defendants are: (1) the Corporation for Public Broadcasting (CPB); (2) the Public Broadcasting Service (PBS); and (3) Clay T. Whitehead and Patrick J. Buchanan (the federal defendants).

CPB is a nonprofit corporation, incorporated under the laws of the District of Columbia and established pursuant to the Act. The CPB was established to facilitate the development of educational broadcasting, to assist in the development of systems of interconnection for the distribution of educational television and radio programs and to engage in those activities in ways that will most effectively assure the maximum freedom of noncommercial educational systems and stations from interference. 47 U.S.C. § 396(g)(1)(A)-(D).

PBS is a nonprofit membership corporation organized under the laws of the District of Columbia. Its membership consists of the licensees of noncommercial educational television stations. The purpose of PBS, according to its Articles of Incorporation, is to arrange for and provide interconnection facilities for the distribution of noncommercial broadcast programs and to generally assist and support noncommercial broadcasting pursuant to the Public Broadcasting Act.[1] The Act provides that CPB will facilitate the establishment of one or more interconnection systems; it does not however provide specifically for PBS's existence.

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[1] Appendix B, Appendices to Memorandum of Points and Authorities in Support of the Public Broadcasting Service's Motion to Dismiss, at 7-9 (Sept. 6, 1973).

Clay T. Whitehead, one of the federal defendants, is the former Director of the Office of Telecommunications Policy (OTP), a part of the Executive Office of the President, established pursuant to the President's Reorganization Plan No. 1 of 1970, 3 C.F.R. 1066 (1966-1970 Comp.). He resigned from his position effective September 15, 1974, after commencement of this action. The responsibilities of the Director of OTP are, (and were) *inter alia*, to serve as the President's principal adviser on telecommunications, assure effective communication of the views of the Executive Branch on telecommunications policy to Congress and to the Federal Communications Commission (FCC), and to coordinate telecommunications activities of the Executive Branch. Executive Order No. 11556, September 4, 1970.

Patrick J. Buchanan, the other federal defendant, is a former Special Consultant to the President. He resigned effective November 15, 1974, after the commencement of this suit. He gave advice and counsel to the President on public broadcasting as part of his duties as Special Consultant.

II

Pleadings

The plaintiffs complain that the defendants have acted in violation of the Public Broadcasting Act and the First and Fifth Amendments.

They cite defendants Whitehead and Buchanan for allegedly attempting to influence votes by the CPB Board of Directors, to cause the CPB to cease funding controversial public affairs programming, and to have certain educational network broadcasters removed from the air.

The plaintiffs also allege that CPB and PBS acted illegally in that they engaged in the practices of censoring entire programs, or parts thereof, prior to distribution to local stations; prescreening and allowing others to pre-

screen programs produced for noncommercial educational television prior to distribution; issuing warnings to—"flagging"—local stations of program content considered by them to be controversial; requiring detailed descriptions of program content in applications for funding; and allowing the federal defendants (Whitehead and Buchanan) to affect program content. In addition, plaintiffs charge violations of the Act by CPB in that CPB allegedly participates illegally in programming and operation of a network. Finally, they charge that the CPB Board of Directors is illegally constituted.

CPB and PBS and the federal defendants have each moved to dismiss the action on various grounds. Consideration of the various arguments of the defendants follows.

III

Mootness As To The Federal Defendants

As noted, the plaintiffs allege illegal activity on the part of the federal defendants Whitehead and Buchanan both as individuals and in their official capacities. On January 16, 1975, the federal defendants filed a supplemental memorandum in support of their motion to dismiss which added the additional ground that since Whitehead and Buchanan no longer occupy official positions with the executive office the claims against them are moot. The Court agrees.

The federal courts are limited to the resolution of actual cases and controversies by Article III of the Constitution. There must be "concrete legal issues, presented in actual cases, not abstractions." *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 959, 22 L.Ed.2d 113 (1969). If it is determined at any stage of the proceeding that a case was moot when initiated or became moot because of subsequent events, the Court is without jurisdiction because "[m]ootness is a jurisdictional question." *North Carolina v. Rice*,

404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). *Accord, People of State of California v. San Pablo & Tulane R. Co.*, 149 U.S. 308, 13 S.Ct. 876, 37 L.Ed. 747 (1893); *State of Alabama ex rel. Baxley v. Woody*, 473 F.2d 10 (5th Cir. 1973).

We look first at the claims asserted against the federal defendants as individuals.

It is clear that the declaratory and injunctive relief sought against these defendants relates to power which they possessed as government officials and that there is no basis now, after their resignations from office, for asserting that these individuals represent a threat to the exercise of illegal direction, supervision or control over CPB or its grantees.

The claims against these defendants in their individual capacities are also based upon § 398 of the Act, and the First Amendment. But § 398 is limited in its application to departments, agencies, officers and employees of the United States, and the First Amendment acts only as a restraint upon government action, not that of private persons. *Cf. Public Utilities Commission v. Pollak*, 343 U.S. 451, 461, 72 S.Ct. 813, 96 L.Ed. 1068 (1952). Since Whitehead and Buchanan are no longer in the class of people against whom these provisions operate, the claims against them in their individual capacities are moot. *Cf. DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

The claims against the federal defendants in their official capacities, however, require further consideration.

Fed.R.Civ.P. 25(d)(1) provides for "automatic substitution":

> When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the actions does not abate and his successor is automatically substituted as a party.

The Advisory Committee Notes state that "[i]n general [the rule] will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office." 3B *J. Moore, Federal Practice* ¶ 25.01(13), at 25-38 (2d ed. 1974). *See also Spomer v. Littleton,* 414 U.S. 514, 521 n. 9, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974); 3B *J. Moore, Federal Practice* ¶ 21.09 (1)-(3) (3rd ed. 1974). Substitution is appropriate when the original officer is replaced by an acting officer. *City of New York v. Ruckelshaus,* 358 F.Supp. 669 (D.D.C.1973), *aff'd sub nom. Train v. City of New York,* 420 U.S. 35, 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

The "effective relief" test suggested in the Advisory Committee Notes supports application of Rule 25(d)(1) in this case. The effective relief sought by plaintiffs here, declaratory and injunctive relief regarding past, present and future actions, would have to apply to officials in office. Thus, we must determine whether, in this case, there are appropriate substitute officials within the meaning of the rule.

As to Buchanan it is alleged that upon his resignation his "duties" were taken over by Dean Burch, Counsellor to the President, and later distributed among three different presidential advisers. The difficulty in applying Rule 25(d)(1) to this situation is that Buchanan's position as Special Consultant to the President is not designated to have specific duties and functions under any statutes or regulations. In view of the personal nature of that office, so closely associated with the President, this Court finds that there is no adequate basis for the operation of Rule 25(d)(1) as to defendant Buchanan. Since Buchanan no longer occupies his official position and relief against him as an individual is moot, this Court finds that all claims against defendant Buchanan should be dismissed as moot.

The situation as to Whitehead is different. It is uncontradicted that Whitehead has a successor, John Eger, occupying his position as *Acting* Director. Eger's substitution under Rule 25(d)(1) would accordingly be appropriate.

However, the federal defendants still contend that actions against Eger, Whitehead's successor, would also be moot because the plaintiff's have failed adequately to allege that the successor has continued the allegedly illegal acts of the predecessor. The 1961 amendments to Rule 25(d)(1) removed the requirement that plaintiff must demonstrate the need for continuing the action upon substitution; however, the complaint may be subject to challenge for mootness by the successor. 3B *J. Moore, Federal Practice* ¶ 25.09(3); Advisory Committee Notes of 1961 to Rule 25 (d)(1), *id.* ¶ 25.01(13).

In the recent case of *Spomer v. Littleton,* 414 U.S. 514, 94 S.Ct. 685, 38 L.Ed.2d 694 (1974), the Supreme Court considered the issue of mootness in the context of "automatic substitution" of the defendant's elected successor.[2] The plaintiffs, black citizens, alleging that the local prosecutor and his staff had engaged in specific acts of racial discrimination, sought declaratory and injunctive relief and damages. The Court held that where the complained of illegal actions are personal, no allegations being made that the actions reflect official administration policy, and the plaintiff fails to allege specifically that the successor intends to continue the actions, the complaint is subject to dismissal as moot. The Court distinguished *Allen v. Regents of the University System of Georgia,* 304 U.S. 439, 444-45, 58 S.Ct. 980, 82 L.Ed. 1448 (1938), where university

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[2] In *Spomer v. Littleton, supra,* there was automatic substitution of a successor under Supreme Court Rule 48(3), which is equivalent to and based upon Fed.R.Civ.P. 25(d) as amended in 1961. 414 U.S. at 521 n. 9, 94 S.Ct. 685.

officials challenged tax collection policies of the Collector of Internal Revenue which reflected interpretations of the Internal Revenue Code. The Court held in *Allen* that the allegations were sufficient to justify substitution and withstand challenge for mootness.

Here the plaintiffs have alleged that defendants Whitehead and Buchanan "and other officers and employees of the United States" influenced and coerced CPB Directors, employees, and grantees, and employees of PBS, with the intent to interfere with and control program content. Although plaintiffs allege specific acts of defendants Whitehead and Buchanan, they have not alleged that those acts reflected a general policy of the Executive Branch which could be assumed to have continued to exist under Whitehead's successor. The general allegations as to other unidentified officers and employees do not cure this defect. Therefore, the Court concludes that the claims for declaratory and injunctive relief against the federal defendant Whitehead and his successor in their official capacities are moot.[3]

IV

Implication Of A Private Right Of Action Under The Public Broadcasting Act of 1967

The plaintiffs allege that the actions of the defendants violate §§ 396 and 398 of the Act and that they have a private right of action to enforce those sections. Although unable to identify an express provision of such a right,

[3] Similarly, plaintiffs' Ninth Claim for Relief, *see* note 5 *infra*, alleging that one member of the CPB Board of Directors, Irving Kristol, is serving illegally because he has not been confirmed by the Senate, 47 U.S.C. § 396(c)(1), is also moot for the reasons stated above. The Court is reliably informed that Mr. Kristol severed all official connections with CPB on or about December 31, 1973.

plaintiffs contend that private actions are not precluded by Congress and this particular act necessarily implies a right of action. The Court disagrees.

Recent cases indicate that implication of a right of action from a statute requires close examination of the statute and its legislative history—"the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the act." *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974) (*Amtrak*). *See also Cort v. Ash*, —— U.S. ——, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) (*SIPC*); *Holloway v. Bristol-Meyers Corp.*, 158 U.S.App.D.C. 207, 485 F.2d 986 (1973). In each of these cases, the courts denied a claim to an implied right of action because such action might disrupt the system established by Congress for accomplishing the purposes of the statute, and there was no indication of a legislative intent to permit the action.

Those cases, of course, contrast sharply with *J. I. Case v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964), which did recognize an implied right of action. There the Court held that the Securities Exchange Act of 1934, clearly a regulatory and remedial statute, created a right of action in favor of stockholders damaged by misrepresentations violative of § 14(a) of the Securities Exchange Act of 1934. The Court concluded that the "broad remedial purposes" of the Act and the necessity for private action to effectuate those purposes supported the implication of such a right. But the Public Broadcasting Act is neither remedial nor regulatory, and in contrast to *Borak* there is no indication that the Congress passed the Act to protect any threatened rights.

The plaintiffs contend, however, that as viewers they fall within a category of persons which Congress sought to benefit and that there will be no assurance that those benefits will be available unless viewers are given a right of action to police the activities of CPB.

It is unquestioned that the Act accords benefits to viewers. That is apparent from § 396(a) which provides in part:

> (4) that it furthers the general welfare to encourage noncommercial educational radio and television broadcast programming which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence;
>
> (5) that it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make noncommercial educational radio and television service available to all citizens of the United States; . . . . 47 U.S.C. § 396(a).

But although the "intent to benefit" is apparent,[4] the plaintiffs still fail to demonstrate that the right of action is necessary and appropriate within the meaning of *Borak*, *Cort*, *Amtrak*, *SIPC*, and *Holloway*, *supra*.

In determining whether an alleged implied right of action exists in this case it is important to keep in mind not only what Congress sought to accomplish but the means they provided to accomplish their declared purposes.

The picture which emerges from the statute and its legislative history is that Congress used every effort and every device available to create an entity which would pro-

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[4] The plaintiffs have not specifically argued that the writer, producer, and director plaintiffs were within the group intended to be benefited, and this Court finds no basis for such an assertion.

vide maximum financial and other assistance to the noncommercial educational broadcasting industry with a minimum of federal government involvement. The design is capsulized in the language of § 398 which says in part:

> . . . Nothing contained in this part shall be deemed . . . to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over educational television or radio broadcasting, or over the Corporation [or] any of its grantees or contractors, or over the charter or by-laws of the Corporation . . . . § 398.

By the same token there is no indication whatsoever that Congress intended to provide a private right of action to dissident viewers or other individuals who might be dissatisfied with the operations of CPB.

In the view of the Court, were it to allow suits under the Act by persons who had no more than a viewing interest or who were otherwise merely dissatisfied with the manner in which CPB or its grantees carry out the purposes of the Act, it would seriously impede the attainment of the stated purposes of the Act, and it would inevitable enmesh the courts in supervision of the detailed day-to-day operations of CPB—a result which Congress clearly intended to avoid.[5]

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[5] Plaintiffs' Ninth Claim for Relief alleges, *inter alia*, that CPB's Board of Directors is improperly constituted, in violation of the Public Broadcasting Act of 1967 and of the First Amendment. Even if such a claim were judicially cognizable, *see Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *Keim v. United States*, 177 U.S. 290, 20 S.Ct. 574, 44 L.Ed.774 (1900), inasmuch as it is embraced within the Public Broadcasting Act of 1967, the claim must fail for the reasons stated above in this Part. Furthermore, bottoming such a claim under the rubric of the First Amendment is of no avail in these circumstances. *See* Part V *infra*. *See also* note 3 *supra*.

V

Jurisdictional Issues

We now turn to plaintiffs' claims of jurisdiction based on 28 U.S.C. §§ 1361, 1337 and 1331(a).

28 U.S.C. § 1361. District courts have original jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." The Court agrees with the defendants that § 1361 is inappropriate in this case because CPB and PBS are not agencies of the United States and the members of the CPB Board of Directors are not officers of the United States. The Act specifically provides that CPB "will not be an agency or establishment of the United States Government." 47 U.S.C. § 396(b).[6]

28 U.S.C. § 1337. District Courts have original jurisdiction "of any civil action or proceedings arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Plaintiffs assert jurisdiction under this section by virtue of the fact that the Act came into being as an amendment (Title III) to the Communications Act of 1934, which has been held to be an act regulating commerce. *National Broadcasting Co. v. United States,* 319 U.S. 190, 227, 63 S.Ct. 997, 87 L.Ed. 1344 (1934).[7] The defendants counter that the Act, by its terms, was enacted under the "general welfare"

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[6] Necessarily, then, plaintiffs' reliance on PBS being an agent of CPB for mandamus purposes must also fail. Moreover, PBS is not mentioned at all in the Act.

[7] It does not follow, however, that there is an implied right of action under the Communications Act of 1934. *See, e. g., Smothers v. Columbia Broadcasting System, Inc.,* 351 F.Supp. 622, 624-25 (C.D.Cal. 1972), and cases cited therein.

clause of the Constitution,[8] not the commerce clause, thus making § 1337 applicable to this action.

We need not resolve this dispute in view of our holding, *supra,* that there is no implied private right of action under the Public Broadcasting Act, even if the Act is held to be a regulation of commerce.[9]

28 U.S.C. § 1331(a). This is the "federal question" section, under which plaintiff-viewers assert violations of the First and Fifth Amendments. Plaintiff-viewers claim that the defendants have violated their First Amendment rights to uncensored programs, and to information and knowledge through noncommercial educational television.

However, as plaintiffs recognize, § 1331(a) is not available to confer jurisdiction unless the plaintiffs can also meet the $10,000 requirement. But, it is well established, too, that a dismissal of the complaint for failure to meet the $10,000 requirement is inappropriate unless it appears to a legal certainty that the plaintiff could not recover that statutory amount. *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845 (1938); *Gomez v. Wilson,* 155 U.S.App.D.C. 242, 251, 477 F.2d 411, 420 (1973).

When, as here, the allegation of the jurisdictional amount is controverted, the burden is on the plaintiff to establish that amount. *Gomez v. Wilson, supra. See also Hague v. C.I.O.,* 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939);

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[8] 47 U.S.C. § 396(a)(4) provides:

> The Congress hereby finds and declares that it furthers the *general welfare* to encourage noncommercial educational radio and television broadcast programming which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence. (Emphasis added.)

[9] In that instance, there is no pendent jurisdiction under § 1337. *Post v. Payton,* 323 F.Supp. 799 (E.D.N.Y. 1971).

KVOS, Inc. v. Associated Press, 299 U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183 (1936). Moreover, the fact that the plaintiff alleges the deprivation of some constitutional right, as here, does not translate to mean that the requisite jurisdictional amount need not be satisfied. *Lynch v. Household Finance Corp.,* 405 U.S. 538, 547, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972); *James v. Lusby,* 162 U.S.App.D.C. 352, 499 F.2d 488 (1974); *Gomez v. Wilson, supra.*

Assuming, *arguendo,* that the plaintiff-viewers have properly pleaded a constitutional right to receive uncensored noncommercial educational television programs, the Court concludes that their attempted valuations of that right do not satisfy the statutory standard.[10]

Plaintiffs contend that the $10,000 requirement is met by reason of the following:

(1) First Amendment rights are worth more than $10,000 by definition;

(2) it would cost each plaintiff $10,000 to purchase the unconstitutionally censored programs;

(3) the damages done to noncommercial educational broadcasting has harmed each plaintiff at least $10,000; and

(4) the cost to the defendants in the event of a judgment for the plaintiffs would be in excess of $10,000.

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[10] Although plaintiffs do not seek to maintain a class action, it is nevertheless clear beyond doubt that each of the plaintiffs must individually have in controversy an amount in excess of $10,000. *Zahn v. International Paper Co.,* 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973); *Snyder v. Harris,* 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969).

For the purposes of a motion to dismiss, it is clear, of course, that the allegations of plaintiffs' complaint must be taken as true. *Gardner v. Toilet Goods Ass'n,* 387 U.S. 167, 172, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967).

We look at each of these claims.

(1) As to plaintiff-viewers' assertion that First Amendment rights are by definition worth more than $10,000, it is well established in this Circuit that "any automatic finding of the required amount in controversy just because (constitutional) rights are in issue may be more than § 1331(a) will tolerate." *Gomez v. Wilson, supra,* 155 U.S.App.D.C. at 252 n. 56, 477 F.2d at 421 n. 56. Accordingly, this assertion, without more, must fail.

(2) In measuring the pecuniary value to the claim of the deprivation of their right to receive, plaintiffs attempt to ascribe that valuation in terms of the cost to them in purchasing "lost" programs. This argument, while ingenious,[11] is wide of the mark for two reasons. First, this argument employs a measure of damages not consonant with the asserted loss of a right to receive as set out in their complaint. The claim of the plaintiff-viewers is that they were deprived of the opportunity to experience the ideas and viewpoints contained in certain programs via noncommercial educational television; their complaint does not allege that they were precluded from purchasing such programs. Indeed, plaintiffs' measure of damages in this regard would appear to violate the rules and regulations of the Federal Communications Commission that local licensees must retain the absolute right to edit, select and reject programs. 47 C.F.R. § 73.658(e). *See also National Broadcasting Co. v. United States, supra.* More basically, plaintiffs' argument is devoid of any competent proof that the cost of acquiring a certain program allegedly censored by defendants would in fact exceed $10,000. *Cf. James v. Lusby, supra.*

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[11] "Of course, pleadings must be something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP,* 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973).

(3) Plaintiffs' contention that they are harmed because the institution of noncommercial educational television broadcasting is damaged by the defendants' assertedly unlawful activities is wholly speculative and without any factual foundation. Indeed, there is a conspicuous lack of any concrete injury susceptible to even a low standard of pecuniary valuation. In resolving complex constitutional claims, the federal judicial process may not operate in an amorphous, undefined atmosphere.[12]

(4) In terms of the judgment which the case would produce with regard to the effect on the defendants' activities, were the plaintiffs successful on the merits, the plaintiffs have failed utterly to specify what costs would conceivably be involved. Furthermore, it would appear, as CPB and PBS contend, that the prayer for relief, if granted in full, would merely require CPB and PBS to allocate funds differently than they do at present, rather than resulting in increased costs to those defendants.

Thus, it is clear that none of the plaintiff-viewers has satisfied the requisite jurisdictional amount, and the complaint must be dismissed as to them.[13] *Post v. Payton,*

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[12] In an analogous context, the Supreme Court has consistently held that generalized grievances common to a class do not ordinarily satisfy jurisdictional prerequisites. *See, e. g., Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). Similarly, the interests at stake in federal constitutional litigation must generally be those of the plaintiffs at bar, rather than those of third parties. *See, e. g., United States v. Raines,* 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); *Tileston v. Ullman,* 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943).

[13] The claims of non-viewer plaintiffs Jacobs, Kuney and Landau, set out in the Fourth Claim for Relief, are not on any firmer footing. In their affidavits these plaintiffs assert that, as a result of the alleged failure of CPB and PBS to distribute programs they wrote, directed and produced, they have lost their jobs, have been unable to find similar positions in the noncommercial educational television industry, and that their reputations have been injured.

supra. Cf. Kheel v. Port of New York Authority, 457 F.2d 46 (2d Cir.), *cert. denied,* 409 U.S. 983, 93 S.Ct. 324, 34 L.Ed.2d 248 (1972).

VI

In light of the foregoing, the Court need not reach the remaining First Amendment claims of the plaintiff-viewers, *viz.*, whether CPB and PBS are sufficiently imbued with "state action;"[14] whether these plaintiffs have stated a cause of action of a right to receive under the First Amendment;[15] and whether these plaintiffs have the requisite "standing" to maintain such a cause of action.[16]

They seek damages for the supposed injury to their professional reputations and for the failure to have their work product distributed over noncommercial educational television.

The damages these plaintiffs seek are not for the injury from CPB's and PBS's denial of their alleged rights to communicate ideas or experiences, but rather are damages emanating from loss of jobs and injuries to reputations. These rights, whatever their scope, and the damages, if any, flowing from their alleged violation, are irrelevant to the matter in controversy. The First and Fifth Amendments and the Public Broadcasting Act of 1967 do not protect either these plaintiffs' right to work in the noncommercial educational television field or their professional reputations in that field. Therefore, the Fourth Claim for Relief must be dismissed for failure to state a cause of action upon which relief can be granted. Fed.R.Civ.P. 12(b)(6).

[14] *See, e. g., Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *Greenya v. George Washington University,* 512 F.2d 556 (D.C.Cir. 1975).

[15] *See, e g., Kleindienst v. Mandel,* 408 U.S. 753, 82 S.Ct. 2576, 33 L.Ed.2d 683 (1972); *Avins v. Rutgers,* 385 F.2d 151 (3d Cir. 1967), *cert. denied,* 390 U.S. 920, 88 S.Ct. 855, 19 L.Ed.2d 982 (1968). *Compare Comment—The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations,* 63 Geo. L.J. 775 (1975).

[16] *See, e. g., Warth v. Seldin,* —— U.S. ——, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Schlesinger v. Reservists Comm. to Stop the*

Accordingly, it is by the Court this 23rd day of July, 1975.

Ordered, adjudged and decreed that plaintiffs complaint against the federal defendants Whitehead and Buchanan be, and the same is hereby, dismissed as moot; and it is further

Ordered, adjudged and decreed that plaintiff's Ninth Claim for Relief in the complaint, concerning Irving Kristol, be, and the same is hereby, dismissed as moot; and it is further

Ordered, adjudged and decreed that plaintiffs' complaint alleging a private cause of action for damages and declaratory and injunctive relief under the Public Broadcasting Act of 1967 be, and the same is hereby, dismissed for failure to state a claim upon which relief can be granted; and it is further

Ordered, adjudged and decreed that plaintiffs' complaint alleging jurisdiction under 28 U.S.C. §§ 1337 and 1361 (1970) be, and the same is hereby, dismissed for want of such jurisdiction; and it is further

Ordered, adjudged and decreed that plaintiffs' complaint alleging jurisdiction under 28 U.S.C. § 1331(a) (1970) be, and the same is hereby, dismissed for failure to satisfy the $10,000 jurisdictional amount; and it is further

Ordered, adjudged and decreed that plaintiffs' Fourth Claim for Relief in the complaint be, and the same is hereby, dismissed for failure to state a claim upon which relief can be granted.

War, supra; United States v. Richardson, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *S. v. D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

Civil 1059-73

No. 75-1963

THE NETWORK PROJECT, ET AL., *Appellants*

v.

CORPORATION FOR PUBLIC BROADCASTING, A CORPORATION, ET AL.

Appeal from the United States District Court for the District of Columbia.

Before: ROBINSON and WILKEY, Circuit Judges, and WILLIAM J. JAMESON,* United States Senior District Judge for the District of Montana

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed as to rejection of appellants' statutory claims and to the extent necessary to enable consideration of the constitutional claims on the merits, we reverse the judgment appealed from and re-

mand the case for further proceedings, consistent with the opinion of the Court filed herein this date.

Per Curiam
For the Court
A. Fisher, Clerk
/s/ Robert A. Bonner
By: Robert A. Bonner
Chief Deputy Clerk

Date: July 22, 1977

Opinion for the Court filed by Circuit Judge Robinson

*Sitting by designation pursuant to 28 U.S.C. § 294(d)(1970)

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-326

Public Broadcasting Service, *Petitioner*

v.

The Network Project, et al.

Order Extending Time To File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 15, 1977.

/s/ Warren E. Burger
Chief Justice of the United States.

Dated this 13th day of October, 1977

APPENDIX E

28 U.S.C. § 1331(a) (1970), *as amended by* Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721.

§ 1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C. § 1337 (1970)

§ 1337. Commerce and anti-trust regulations.

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. § 1361 (1970)

§ 1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Public Broadcasting Act of 1967, 47 U.S.C. §§ 396 *et seq.* (1970 & Supp. V 1975).

§ 396. Corporation for Public Broadcasting.

(a) Congressional declaration of policy.

The Congress hereby finds and declares—

(1) that it is in the public interest to encourage the growth and development of noncommercial educational radio and television broadcasting, including the use of such media for instructional purposes;

(2) that expansion and development of noncommercial educational radio and television broadcasting and of diversity of its programing depend on freedom, imagination, and initiative on both the local and national levels;

(3) that the encouragement and support of noncommercial educational radio and television broadcasting, while matters of importance for private and local development, are also of appropriate and important concern of the Federal Government;

(4) that it furthers the general welfare to encourage noncommercial educational radio and television

broadcast programing which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence;

(5) that it is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make noncommercial educational radio and television service available to all the citizens of the United States;

(6) that a private corporation should be created to facilitate the development of educational radio and television broadcasting and to afford maximum protection to such broadcasting from extraneous interference and control.

(b) Establishment of Corporation; application of District of Columbia Nonprofit Corporation Act.

There is authorized to be established a nonprofit corporation, to be known as the "Corporation for Public Broadcasting", which will not be an agency or establishment of the United States Government. The Corporation shall be subject to the provisions of this section, and, to the extent consistent with this section, to the District of Columbia Nonprofit Corporation Act.

(c) Board of Directors; number of members; appointment; political party affiliation; qualifications; representation of interests; term of office; vacancies.

(1) The Corporation shall have a Board of Directors (hereinafter in this section referred to as the "Board"), consisting of fifteen members appointed by the President, by and with the advise and consent of the Senate. Not more than eight members of the Board may be members of the same political party.

(2) The members of the Board (A) shall be selected from among citizens of the United States (not regular fulltime employees of the United States) who are eminent in such fields as education, cultural and civic affairs, or the arts, including radio and television; (B) shall be selected so as to provide as nearly as practicable a broad representation of various regions of the country, various professions and occupations, and various kinds of talent and experience appropriate to the functions and responsibilities of the Corporation.

(3) The members of the initial Board of Directors shall serve as incorporators and shall take whatever actions are necessary to establish the Corporation under the District of Columbia Nonprofit Corporation Act.

(4) The term of office of each member of the Board shall be six years; except that (A) any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term; and (B) the terms of office of members first taking office shall begin on the date of incorporation and shall expire, as designated at the time of their appointment, five at the end of two years, five at the end of four years, and five at the end of six years. No member shall be eligible to serve in excess of two consecutive terms of six years each. Notwithstanding the preceding provisions of this paragraph, a member whose term has expired may serve until his successor has qualified.

(5) Any vacancy in the Board shall not affect its power, but shall be filled in the manner in which the original appointments were made.

(d) Election of Chairman and Vice Chairman or Vice Chairmen; nonfederal employment status of members; compensation and travel expenses.

(1) The President shall designate one of the members first appointed to the Board as Chairman; thereafter the members of the Board shall annually elect one of their number as Chairman. The members of the Board shall also elect one or more of them as a Vice Chairman or Vice Chairmen.

(2) The members of the Board shall not, by reason of such membership, be deemed to be employees of the United States. They shall, while attending meetings of the Board or while engaged in duties related to such meetings or in other activities of the Board pursuant to this subpart be entitled to receive compensation at the rate of $100 per day including travel time, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, equal to that authorized by law (5 U.S.C. 5703) for persons in the Government service employed intermittently.

(e) Officers and employees; term of office; compensation, qualifications, and removal; political party affiliation, political test or qualification when taking personnel actions.

(1) The Corporation shall have a President, and such other officers as may be named and appointed by the Board for terms and at rates of compensation fixed by the Board. No individual other than a citizen of the United States may be an officer of the Corporation. No officer of the Corporation, other than the Chairman and any Vice Chairman, may receive any salary or other compensation from any source other than the Corporation during the period of his employment by the Corporation. All officers shall serve at the pleasure of the Board.

(2) Except as provided in the second sentence of subsection (c)(1) of this section, no political test or qualification shall be used in selecting, appointing, promoting,

or taking other personnel actions with respect to officers, agents, and employees of the Corporation.

(f) Nonprofit and nonpolitical nature of the Corporation.

(1) The Corporation shall have no power to issue any shares of stock, or to declare or pay any dividends.

(2) No part of the income or assets of the Corporation shall inure to the benefit of any director, officer, employee, or any other individual except as salary or reasonable compensation for services.

(3) The Corporation may not contribute to or otherwise support any political party or candidate for elective public office.

(g) Purposes and activities of the Corporation; powers under the District of Columbia Nonprofit Corporation Act.

(1) In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a) of this section, the Corporation is authorized to—

(A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature;

(B) assist in the establishment and development of one or more systems of interconnection to be used for the distribution of educational television or radio programs so that all noncommercial educational television or radio broadcast stations that wish to may broadcast the programs at times chosen by the stations;

(C) assist in the establishment and development of one or more systems of noncommercial educational television or radio broadcast stations throughout the United States;

(D) carry out its purposes and functions and engage in its activities in ways that will most effectively assure the maximum freedom of the noncommercial educational television or radio broadcast systems and local stations from interference with or control of program content or other activities.

(2) Included in the activities of the Corporation authorized for accomplishment of the purposes set forth in subsection (a) of this section are, among others not specifically named—

(A) to obtain grants from and to make contracts with individuals and with private, State and Federal agencies, organizations, and institutions;

(B) to contract with or make grants to program production entities, individuals, and selected noncommercial educational broadcast stations for the production of, and otherwise to procure, educational television or radio programs for national or regional distribution to noncommercial educational broadcast stations;

(C) to make payments to existing and new noncommercial educational broadcast stations to aid in financing local educational television or radio programing costs of such stations, particularly innovative approaches thereto, and other costs of operation of such stations;

(D) to establish and maintain a library and archives of noncommercial educational television or radio programs and related materials and develop public awareness of and disseminate information

about noncommercial educational television or radio broadcasting by various means, including the publication of a journal;

(E) to arrange, by grant or contract with appropriate public or private agencies, organizations, or institutions, for interconnection facilities suitable for distribution and transmission of educational television or radio programs to noncommercial educational broadcast stations;

(F) to hire or accept the voluntary services of consultants, experts, advisory boards, and panels to aid the Corporation in carrying out the purposes of this section;

(G) to encourage the creation of new noncommercial educational broadcast stations in order to enhance such service on a local, State, regional, and national basis;

(H) conduct (directly or through grants or contracts) research, demonstrations, or training in matters related to noncommercial educational television or radio broadcasting and the use of nonbroadcast communications technologies for the dissemination of educational television or radio programs.

(3) To carry out the foregoing purposes and engage in in the foregoing activities, the Corporation shall have the usual powers conferred upon a non-profit corporation by the District of Columbia Non-profit Corporation Act, except that the Corporation may not own or operate any television, or radio broadcast station, system, or network, community antenna television system, or interconnection or program production facility.

(h) Authorization for free or reduced rate interconnection service.

Nothing in the Communications Act of 1934, as amended, or in any other provision of law shall be construed to prevent United States communications common carriers from rendering free or reduced rate communications interconnection services for noncommercial educational television or radio services, subject to such rules and regulations as the Federal Communications Commission may prescribe.

(i) Report to Congress.

The Corporation shall submit an annual report for the preceding fiscal year ending June 30 to the President for transmittal to the Congress on or before the 31st day of December of each year. The report shall include a comprehensive and detailed report of the Corporation's operations, activities, financial condition, and accomplishments under this section and may include such recommendations as the Corporation deems appropriate. The officers and directors of the Corporation shall be available to testify before appropriate committees of the Congress with respect to such report, the report of any audit made by the Comptroller General pursuant to subsection (*l*) of this section, or any other matter which any such committee may determine.

(j) Repeal, alteration, or amendment.

The right to repeal, alter, or amend this section at any time is expressly reserved.

(k) Financing.

(1) There is authorized to be appropriated for expenses of the Corporation $50,000,000 for the fiscal year ending June 30, 1974, and $60,000,000 for the fiscal year ending June 30, 1975.

(2) In addition to the sums authorized to be appropriated by paragraph (1) of this subsection, there are authorized to be appropriated for payment to the Corporation for each fiscal year during the period July 1, 1970, to June 30, 1975, amounts equal to the amount of total grants, dona-

tions, bequests, or other contributions (including money and the fair market value of any property) from non-Federal sources received by the Corporation under subsection (g)(2)(A) of this section during such fiscal year; except that the amount appropriated pursuant to this paragraph for any fiscal year may not exceed $5,000,000.

(3) There is hereby established in the Treasury a fund which shall be known as the "Public Broadcasting Fund" administered by the Secretary of the Treasury. There are authorized to be appropriated to such fund for each of the fiscal years during the period beginning July 1, 1975, and ending September 30, 1980, an amount equal to 40 per centum of the total amount of non-Federal financial support received by public broadcasting entities during the fiscal year second preceding each such fiscal year, and for the period July 1, 1976, through September 30, 1976, an amount equal to 10 per centum of the total amount of non-Federal financial support received by public broadcasting entities during the fiscal year ending June 30, 1975; except that the amount so appropriated shall not exceed $88,000,00 for the fiscal year ending June 30, 1976; $22,000,000 for the period July 1, 1976, through September 30, 1976; $103,000,000 for the fiscal year ending September 30, 1977; $121,000,000 for the fiscal year ending September 30, 1978; $140,000,000 for the fiscal year ending September 30, 1979; and $160,000,000 for the fiscal year ending September 30, 1980.

(4) The funds authorized by this subsection shall be used solely for the expenses of the Corporation. The Corporation shall determine the amount of non-Federal financial support received by public broadcasting entities during each of the fiscal years indicated in paragraph (3) of this subsection for the purpose of determining the amount of each authorization, and shall certify such amount to the Secretary of the Treasury. Upon receipt of such certification, the Secretary of the Treasury shall disburse to the

Corporation, from such funds as may be appropriated to the Public Broadcasting Fund, the amount authorized for each of the fiscal years and for the period July 1, 1976, through September 30, 1976, pursuant to the provisions of this subsection.

(5) The Corporation shall reserve for distribution among the licensees and permittees of noncommercial educational broadcast stations that are on-the-air an amount equal to not less than 40 per centum of the funds disbursed to the Corporation from the Public Broadcasting Fund during the period July 1, 1975, through September 30, 1976, and in each fiscal year in which the amount disbursed is $88,000,000 or more, but less than $121,000,000; not less than 45 per centum in each fiscal year in which the amount disbursed is $121,000,000 or more, but less than $160,000,000; and not less than 50 per centum in each fiscal year in which the amount disbursed is $160,000,000.

(6) The Corporation shall, after consultation with licensees and permittees of noncommercial educational broadcast stations that are on-the-air, establish, and review annually, criteria and conditions regarding the distribution of funds reserved pursuant to paragraph (5) of this subsection, as set forth below:

(A) The total amount of funds shall be divided into two portions, one to be distributed among radio stations, and one to be distributed among television stations. The Corporation shall make a basic grant from the portion reserved for television stations to each licensee and permittee of a noncommercial educational television station that is on-the-air. The balance of the portion reserved for telvision stations and the total portion reserved for radio stations shall be distributed to licensees and permittees of such stations in accordance with eligibility criteria that promote the public interest in noncommercial educational broadcasting, and on the basis of a formula designed to—

(i) provide for the financial need and requirements of stations in relation to the communities and audiences such stations undertake to serve;

(ii) maintain existing, and stimulate new, sources of non-Federal financial support for stations by providing incentives for increases in such support; and

(iii) assure that each eligible licensee and permittee of a noncommercial educational radio station receives a basic grant.

(B) No distribution of funds pursuant to this subsection shall exceed, in any fiscal year, one-half of a licensee's or permittee's total non-Federal financial support during the fiscal year second preceding the fiscal year in which such distribution is made.

(7) Funds distributed pursuant to this subsection may be used at the discretion of stations for purposes related to the provision of educational television and radio programing, including but not limited to the following: producing, acquiring, broadcasting, or otherwise disseminating educational television or radio programs; procuring national or regional program distribution services that make educational television or radio programs available for broadcast or other dissemination at times chosen by stations; acquiring, replacing, and maintaining facilities, and real property used with facilities, for the production, broadcast, or other dissemination of educational television and radio programs; developing and using nonbroadcast communications technologies for educational television or radio programing purposes.

(l) Records and audit of the Corporation and the recipients of assistance.

(1)(A) The accounts of the Corporation shall be audited annually in accordance with generally accepted auditing

standards by independent certified public accountants or independent licensed public accountants certified or licensed by a regulatory authority of a State or other political subdivision of the United States. The audits shall be conducted at the place or places where the accounts of the Corporation are normally kept. All books, accounts, financial records, reports, files, and all other papers things, or property belonging to or in use by the Corporation and necessary to facilitate the audits shall be made available to the person or persons conducting the audits; and full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents and custodians shall be afforded to such person or persons.

(B) The report of each such independent audit shall be included in the annual report required by subsection (i) of this section. The audit report shall set forth the scope of the audit and include such statements as are necessary to present fairly the Corporation's assets and liabilities, surplus or deficit, with an analysis of the changes therein during the year, supplemented in reasonable detail by a statement of the Corporation's income and expenses during the year, and a statement of the sources and application of funds, together with the independent auditor's opinion of those statements.

(2)(A) The financial transactions of the Corporation for any fiscal year during which Federal funds are available to finance any portion of its operations may be audited by the General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States. Any such audit shall be conducted at the place or places where accounts of the Corporation are normally kept. The representative of the General Accounting Office shall have access to all books, accounts, records, reports, files, and all other papers, things, or property be-

longing to or in use by the Corporation pertaining to its financial transactions and necessary to facilitate the audit, and they shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, records, reports, files, papers and property of the corporation shall remain in possession and custody of the Corporation.

(B) A report of each such audit shall be made by the Comptroller General to the Congress. The report to the Congress shall contain such comments and information as the Comptroller General may deem necessary to inform Congress of the financial operations and condition of the Corporation, together with such recommendations with respect thereto as he may deem advisable. The report shall also show specifically any program, expenditure, or other financial transaction or undertaking observed in the course of the audit, which, in the opinion of the Comptroller General, has been carried on or made without authority of law. A copy of each report shall be furnished to the President, to the Secretary, and to the Corporation at the time submitted to the Congress.

(3)(A) Each recipient of assistance by grant or contract, other than a fixed price contract awarded pursuant to competitive bidding procedures, under this section shall keep such records as may be reasonably necessary to fully disclose the amount and the disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connnection with such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

(B) The Corporation or any of its duly authorized representatives, shall have access for the purpose of audit and examination to any books, documents, papers, and rec-

ords of the recipient that are pertinent to assistance received under this section. The Comptroller General of the United States or any of his duly authorized representatives shall also have access thereto for such purpose during any fiscal year for which Federal funds are available to the Corporation.

§ 397. Definitions.

For the purposes of sections 390 to 399 of this title—

(1) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(2) The term "construction", as applied to educational television broadcasting facilities, or educational radio broadcasting facilities means the acquisition and installation of transmission apparatus (including towers, microwave equipment, boosters, translators, repeaters, mobile equipment, and video-recording equipment) necessary for television broadcasting or radio broadcasting, as the case may be, including apparatus which may incidentally be used for transmitting closed circuit television programs, but does not include the construction or repair of structures to house such apparatus. In the case of apparatus the acquisition and installation of which is so included, such term also includes planning therefor.

(3) The term "Secretary" means the Secretary of Health, Education, and Welfare.

(4) The terms "State educational television agency" and "State educational radio agency" mean, with respect to television broadcasting and radio broadcasting, respectively, (A) a board or commission established by State law for the purpose of promoting such broadcasting within a State, (B) a board or commission appointed by the Governor of a State for such purpose if such appointment is

not inconsistent with State law, or (C) a State officer or agency responsible for the supervision of public elementary or secondary education or public higher education within the State which has been designated by the Governor to assume responsibility for the promotion of such broadcasting; and, in the case of the District of Columbia, the term "Governor" means the Commissioner of the District of Columbia and, in the case of the Trust Territory of the Pacific Islands, means the High Commissioner thereof.

(5) The term "nonprofit" as applied to any foundation, corporation, or association, means a foundation, corporation, or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(6) The term "Corporation" means the Corporation authorized to be established by subpart B of this part.

(7) The term "noncommercial educational broadcast station" means a television or radio broadcast station, which (A) under the rules and regulations of the Federal Communications Commission in effect on November 7, 1967, is eligible to be licensed or is licensed by the Comission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association or (B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.

(8) The term "interconnection" means the use of microwave equipment, boosters, translators, repeaters, communication space satellites, or other apparatus or equipment for the transmission and distribution of television or radio programs to non-commercial educational television or radio broadcast stations.

(9) The term "educational television or radio programs" means programs which are primarily designed for educational or cultural purposes.

(10) The term "non-Federal financial support" means the total value of cash and the fair market value of property and services (except for personal services of volunteers) received—

(A) as gifts, grants, bequests, donations, or other contributions for the construction or operation of noncommercial educational broadcast stations, or for the production, acquisition, distribution, or dissemination of educational television or radio programs, and related activities, from any source other than (i) the United States or any agency or establishment thereof, or (ii) any public broadcasting entity; or

(B) as gifts, grants, donations, contributions, or payments from any State, any agency or political subdivision of a State, or any educational institution, for the construction or operation of non-commercial educational broadcast stations or for the production, acquisition, distribution, or dissemination of educational television or radio programs, or payments in exchange for services or materials respecting the provision of educational or instructional television or radio programs.

(11) The term "public broadcasting entity" means the Corporation, any licensee or permittee of a non-commercial educational broadcast station, or any nonprofit institution engaged primarily in the production, acquisition, distribution, or dissemination of educational television or radio programs.

§ 398. Federal interference or control prohibited.

Nothing contained in sections 390 to 399 of this title shall be deemed (1) to amend any other provision of, or requirement under this chapter; or (2) to authorize any department, agency, officer, or employee of the United States to exercise any direction, suprevision, or control over educational television or radio broadcasting, or over the Corporation or any of its grantees or contractors, or over the charter or bylaws of the Corporation, or over the curriculum, program of instruction, or personnel of any educational institution, school system, or educational broadcasting station or system.

§ 399. Editorializing and support of political candidates prohibited; recording of certain programs.

(a) No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

(b)(1) Except as provided in paragraph (2), each licensee which receives assistance under sections 390 to 399 of this title after August 6, 1973, shall retain an audio recording of each of its broadcasts of any program in which any issue of public importance is discussed. Each such recording shall be retained for the sixty-day period beginning on the date on which the licensee broadcasts such program.

(2) The requirements of paragraph (1) shall not apply with respect to a licensee's broadcast of a program if an entity designated by the licensee retains an audio recording of each of the licensee's broadcasts of such a program for the period prescribed by paragraph (1).

(3) Each licensee and entity designated by a licensee under paragraph (2) which retains a recording under paragraph (1) or (2) shall, in the period during which such recording is required under such paragraph to be retained, make a copy of such recording available—

(A) to the Commission upon its request, and

(B) to any other person upon payment to the licen-

see or designated entity (as the case may be) of its reasonable cost of making such copy.

(4) The Commission shall by rule prescribe—

(A) the manner in which recordings required by this subsection shall be kept, and

(B) the conditions under which they shall be available to persons other than the Commission, giving due regard to the goals of eliminating unnecessary expense and effort and minimizing administrative burdens.

Supreme Court, U. S.
FILED
JAN 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-858

PUBLIC BROADCASTING SERVICE,

Petitioner,

v.

THE NETWORK PROJECT, *et al.*,

Respondent.

No. 77-864

CORPORATION FOR PUBLIC BROADCASTING,

Petitioner,

v.

THE NETWORK PROJECT, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OSCAR G. CHASE
250 Joralemon Street
Brooklyn, New York 11201

JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Counsel for Respondents

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77 - 858

PUBLIC BROADCASTING SERVICE,

Petitioner,

v.

THE NETWORK PROJECT, et al.,

Respondent.

NO. 77 - 864

CORPORATION FOR PUBLIC BROADCASTING,

Petitioner,

v.

THE NETWORK PROJECT, et al.,

Respondent

Brief In Opposition to Petitions for
Writ of Certiorari to the
United States Court of Appeals
For the District of
Columbia Circuit

STATEMENT OF THE CASE

Plaintiffs in this action are viewers of public television, organizations which represent viewers, and producers of television programming who suffered financial injury because their work was improperly censored by some or all of the defendants. Named as defendants were the Corporation for Public Broadcasting (CPB),[1] the Public

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1. CPB was "established pursuant to congressional authorization as a conduit for federal funds for public television." Opinion of the court of appeals at 1a. (Except as otherwise indicated all references are to the appendix of the Petition of the Public Broadcasting Service).

Broadcasting Service (PBS),[2] Clay T. Whitehead, former Director of the Office of Telecommunications Policy and Patrick J. Buchanan, former Special Assistant to President Nixon.[3] The complaint alleged in essence that the defendants, acting singly and in concert, subjected the content of public television to censorship in violation of the First Amendment and the Public Broadcasting Act of 1967, 47 U.S.C. §396 et seq. (1970 and Supp. V 1975).

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2. PBS was "created by CPB to distribute public television programs to local stations," Id. at 1a - 2a.

3. The claims against defendants Whitehead and Buchanan were dismissed as moot, 3a - 6a.

Jurisdiction was predicated, inter alia on 28 U.S.C. §1331, 1337, and 1361 (1970) and on the First Amendment.[4]

Shortly after the action was commenced, plaintiffs served and filed substantial discovery requests which included interrogatories, demands to produce documents and requests for admissions. There followed extensive motion practice. Rather than responding to these requests defendants sought and obtained various protective orders which were made effective until the disposition of tneir simultaneous motions to dismiss the action. Defendants PBS and CPB pursued a relatively common tack; each moved to dismiss on the

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4. Complaint, para. 1, Appendix to Brief for Appellants in the court of appeals, A 3.

grounds that there was a lack of jurisdiction over the subject matter, a failure to state a claim on which relief could be granted and a lack of standing. Defendants Buchanan and Whitehead moved jointly to dismiss on grounds substantially similar to those of PBS and CPB but coupled their motion with one for summary judgment. With respect to the latter they argued that their activities in relation to public broadcasting were undertaken in lawful exercise of their official responsibilities.[5] Voluminous affidavits and exhibits were filed in support of the Whitehead-Buchanan summary judgment motion. Following the resignations

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5. Federal Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed September 14, 1973.

from federal service or defendants Whitehead (on September 15, 1974) and Buchanan (on November 15, 1974) mootness was added as a further defense by each of them.[6]

Although the defendants' motions to dismiss were all filed in September, 1973, the motions were not argued until January 17, 1975. This delay was occasioned primarily by the good faith but protracted efforts of the parties to settle the action, efforts which were unfortunately unsuccessful.

On July 23, 1975, the District Judge decided defendants' motions by

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6. Second Supplemental Memorandum In Support of Federal Defendants' Motion to Dismiss and/or in the Alternative for Summary Judgment, filed January 16, 1975.

(1) dismissing as moot the claims against defendants Whitehead and Buchanan, 28a - 32a; (2) dismissing, for failure to state a claim upon which relief could be granted, those allegations based on the Public Broadcasting Act of 1967 because it found that no private right of action was implied by that act, 32a - 35a, 42a; (3) holding that there was no jurisdiction over the subject matter of plaintiffs' First Amendment claims, 36a - 41a. The last ruling was bottomed on the district court's conclusions that neither CPB nor PBS were "agencies" within the meaning of 28 U.S.C. §1361, 36a, and that the jurisdictional amount required by 28 U.S.C. §1331 was unmet, 37a - 41a. The district court expressly avoided the question of jurisdiction

under 28 U.S.C. §1337 because, it held, its decision that there was no statutory right of action made unnecessary a resolution of the jurisdictional issue, 36a - 37a.[7] Nor, it held as a consequence, was there any occasion to address the issue of pendent jurisdiction over the constitutional claims, 37a n. 9. The court of appeals, in an opinion by Judge Robinson in which Judge Wikey and Judge Jameson concurred, affirmed the mootness finding as to defendant Whitehead,[8] but reversed the

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7. The district court's statement, at 42a, that there was a want of jurisdiction under 28 U.S.C. §1337 was apparently an error inasmuch as the question had been expressly reserved at 37a.

8. No appeal was taken from the dismissal of the action against defendant Buchanan.

dismissal on jurisdictional grounds. It held that jurisdiction to decide the statutory claims properly rested on 28 U.S.C. §1337, 8a - 10a, and that the constitutional claims were so closely related to the former that they constituted one constitutional case for the purposes of pendent jurisdiction, 10a. The court went on to hold that considerations of judicial economy, convenience and fairness required the exercise of pendent jurisdiction in this case. Accordingly, the issues which will be before the district court if certiorari is denied are whether the plaintiff television producers have valid claims for damages against CPB and PBS under the First Amendment and whether the plaintiff viewers have valid First Amendment

claims for injunctive and declaratory relief.

CERTIORARI SHOULD NOT BE GRANTED

Several factors combine to make this case particularly ill suited for a grant of certiorari. The decision below, which rests primarily on the wholly federal nature of this case, accords with an unbroken line of recent authority in this Court. The decision is not in conflict with decisions in other courts of appeals. It does not finally determine the action. Lastly, the question as to which certiorari is sought is one ultimately turning on the exercise of discretion which, in the absence of a result wholly departing from the principles generally applicable, is not a question which should occupy the attention of this Court.

Seeking certiorari in the face of these factors petitioners urge that the court of appeals wrongly evaluated the "'considerations of judicial economy, convenience and fairness' which underlie a proper exercise of pendent jurisdiction. . ."[9] In particular the petitioners argue that the lower court over-emphasized the importance of the federal nature of the pendent claim (i.e. that the defendants had violated the First Amendment).[10] An evaluation of the applicable decisions of this

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9. Petition of CPB at 7. See also Petition of PBS at 10.

10. Petition of CPB at 7; Petition of PBS at 11-12.

Court reveals, however, that the court of appeals considered the appropriate factors and reached a proper result.

In the case most relevant, Hagans v. Lavine, 415 U.S. 528 (1974), petitioners challenged a New York State regulation on the grounds that it violated the Equal Protection Clause of the Constitution and conflicted with the Social Security Act and regulations of the Department of Health, Education and Welfare. Jurisdiction was sought under 28 U.S.C. §1343. This Court, reversing the court of appeals, ruled that since there was jurisdiction over the constitutional claim and since that claim was not insubstantial it was "clear that the District Court could hear as a matter of pendent jurisdiction the claim of conflict

between federal and state law without determining that the latter claim in its own right was encompassed within §1343", 415 at 536. The Court went on to address the issue of whether, given the power to hear the pendent claim, the lower court should have exercised its discretion to do so, Id. at 415 U.S. 545 - 550. It rejected an argument strikingly similar to that presented by petitioners here[11] and held that where the pendent question "was essentially one of federal policy. . . the argument for the exercise of pendent jurisdiction was 'particularly strong,'" Id. at 415 U.S. 550, quoting Rosado v. Wyman, 397 U.S. 397, 404 (1970).

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11. See especially 415 U.S. at 545.

To be sure, the present case may be distinguished from Hagans in that here the pendent claim is constitutional rather that statutory. Seizing on this point petitioners argue that Hagans is not apposite[12] because the exercise of jurisdiction here will not allow the avoidance of a constitutional decision as it did in Hagans. But that case, rather than resting solely on the desirability of avoiding the unnecessary resolution of constitutional issues also stressed the importance of allowing a federal forum to entertain federal claims, 415 U.S. at 548 - 550. This point is especially relevant here: Not only is the cause

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12. Petition of PBS at 17 - 19; Petition of CPB at 10.

of action federal in nature but the case concerns the administration of a program funded and established by the United States under a federal statute dealing with a nation-wide system of communications.[13] These considerations counsel the correctness of the decision below insofar as it rested on Hagans. Reliance need not be placed on Hagans alone. Also supporting the court of appeals' conclusion is Romero v. International Terminal Operating Co., 358 U.S. 354, 380-381 (1959) in which this Court found, in the absence of the constitutional avoidance factor, pendent jurisdiction over federal maritime claims justifiable in part because of their federal nature. See also

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13. See notes 1 and 2, supra.

United Mine Workers v. Gibbs, 383 U.S. 715, 729 (1966).

The inherently federal nature of this case is not the only factor on which the decision below rests. The court of appeals said:

> We do not suggest that a federal court must automatically or necessarily assume jurisdiction of every pendent federal claim. . . we do say, however, that the involvement of federal law in a pendent claim is a factor significantly affecting the proper exercise of that discretion. 14a

The court of appeals did not articulate the other "considerations of judicial economy, convenience and fairness" 11a, which support its conclusion but other factors there surely are and they do support the result reached. First, the district judge had already expended considerable time and energy in evaluating

the statutory and constitutional claims and the relationships among the various defendants. This was necessary in order to make a reasoned determination of the private right of action question, 32a - 35a, the jurisdictional amount question, 37a - 41a, and the mootness question, 28a - 32a. All of this was against the background of a novel and complex statutory scheme, the Public Broadcasting Act of 1967,[14] which is not easily mastered. Second, by holding the constitutional claim pendent to the statutory claim the court of appeals itself avoided the need to decide the difficult issue of whether the amount

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14. Set out in full at 47a - 64a.

in controversy requirement of 28 U.S.C. §1331 was in fact met, a question which thus remains open.[15] Third, the plaintiffs in this public interest action had themselves expended considerable energy litigating the case in the District Court through motion practice and discovery requests. The fairness

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15. See the district judge's discussion in his Opinion at 37a - 41a.

The evaluation of claimed jurisdictional amounts in the context of substantive constitutional claims has presented thorny problems which this Court has not yet resolved, see e.g. Spock v. David, 502 F.2d 953 (3d Cir. 1974) reversed on other grounds sub nom Greer v. Spock, 424 U.S. 828 (1976) (proper basis for determining whether the jurisdictional amount is met in First Amendment case involving pamphleteering is the cost of alternative means of transmitting the message). See also Cortright v. Resor, 325 F.Supp. 797, 810 (E.D.N.Y.), rev'd on other grounds, 447 F.2d 245, 250-251 (2d Cir. 1971), cert denied, 405 U.S. 965 (1972) (First Amendment rights inherently meet the jurisdictional amount; any other result would itself be unconstitutional).

factor militated against forcing them to start afresh in a state court which would be subject to a different code of procedure and which would be unfamiliar with the wholly federal issues raised by this case.

It is difficult to see how a further parsing of those factors of fairness, economy and convenience by this Court would be justified given the undeniable press on its docket of more weighty matters. This conclusion is supported by petitioner CPB's own analysis of the cases in the courts of appeals.[16] While it urges that there is a "rule of thumb" under which the pendent claim should have been dismissed,[17]

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16. Petition of CPB at 13 - 15.

17. Petition of CPB at 14. See also Petition of PBS at 10 note 14

petitioner concedes that none of the cases it cites to establish this rule involved pendent federal claims. This is tantamount to admitting that no conflict among the circuits exists, for the federal nature of the pendent claim primarily informed the ruling of the court of appeals.

Nor did Aldinger v. Howard, 427 U.S. 1 (1976) require a different result.[18] That case, holding that the pendent jurisdiction doctrine did not support the exercise of federal jurisdiction over a state law claim against a party not otherwise subject to federal jurisdiction is inapposite. As this Court, speaking through Mr.

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18. Compare Petition of CPB at 12.

Justice Rehnquist, said:

> The situation with respect to the impleading of a new party, however, strikes us as being both factually and legally different from the situation facing the Court in Gibbs and its predecessors. 427 U.S. 14, 19

In sum, given the firm legal footing on which the decision below stands, the absence of a conflict among the circuits, the wholly federal nature of the case, and the discretionary nature of the decision itself, no reason exists for granting the writ.

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19. See also, Id. at 427 U.S. 15 - 16.

CONCLUSION

For all of the reasons stated, the petitions should be denied.

Respectfully submitted,

Oscar G. Chase
250 Joralemon Street
Brooklyn, N.Y. 11201

Joel M. Gora
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N.Y. 10016

Counsel for Respondents

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